THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(*Coram: Mwangusya, Opio-Aweri and Mwondha, JJ.S.C)*

CIVIL REFERENCE NO.09 0F 2017

(ARISING FROM CIVIL APPLICATION NO. 23 OF 2016)

BETWEEN

KATAYIRA FRANCIS :: APPLICANT

AND

ROGERS BOSCO BUGEMBE :: RESPONDENT

(A *Reference from the Ruling and order of Prof. Tibatemwa-Ekirikubinza, JSC (sitting as a single Justice) dated 6th April, 2017, in Civil Application No.23 of 2016.)*

RULING OF THE COURT

Background

The Applicant was sued in the High Court by the respondent who is the Administrator of the estate of the Late Kristopha Wadda for the following reliefs:

1. Recovery of land comprised in Kibuga Block 14 pot 124 at Ndeeba
2. An order directing the Chief Registrar of Title to cancel the applicants name from the Certificate of Title of the suit land and substituted with his names.
3. General damages
4. Mesne profits

5. An eviction order
6. Cost of the suit

The respondent pleaded that the applicant had got registered on the suit land through fraud and although the applicant pleaded that he was a bonafide purchaser for value without notice of defect of title the court found that if he had inquired the status of the land he would have found that it belonged to the estate of the late Kristopha Wadda. The trial Judge directed the Chief Registrar of Titles to cancel the applicants name from the Registrar and substitute it with that of the respondent.

On the 23rd October 2014 the applicant filed a Notice of Appeal to the Court of Appeal against the High Court judgment. He indicated his address of service as Makada & Partners Advocates and Solicitors but when the High Court Registrar informed the firm that the proceedings were ready one of the lawyers in the firm informed the Registrar that they no longer represented this applicant with whom they had lost contact. On the 23rd September, 2016 the respondent filed a Miscellaneous Application No. 139 of 2016 for striking out the applicant's Notice of Appeal on the ground that a period of two years had expired without him filing a Memorandum of Appeal.

The Miscellaneous Application was set down for hearing on 27.09.2016. The applicant was in Court without his Counsel. Counsel for the respondent was present. The applicant sought for an adjournment to consult another Counsel because the one representing him was out of the country. The adjournment was denied and Court made a finding that the applicant's Notice of Appeal was withdrawn by operation of the Law i.e. Rule 84 of the Court of Appeal Rules which is to the effect that a party who lodges a Notice of Appeal and fails to institute an appeal within the prescribed time is taken to have withdrawn it. The prescribed time is sixty day.

The Applicant appealed against the Order of the Court of Appeal on the ground that his Notice of Appeal had been struck out by the Court of Appeal without

giving him an opportunity to be heard and that his failure to lodge his appeal on time was because his former Counsel of Makada & Partners had not received the Certified Copy of proceedings in time.

Following the appeal against the order of the Court of Appeal the applicant filed an application for stay of execution and interim order of stay of execution. The application for an interim order of stay of execution was heard by Justice Prof Tibatemwa-Ekirikubinza as a single Justice. She dismissed the application. Hence this reference.

The applicant filed the reference to a panel of three Justices of the Supreme Court under the provisions of Section 8(2) of the Judicature Act and Rule 52(1) (b) of the Judicature (Supreme Court Rules) Directions S. I. 13 – 11 seeking for an order that the orders and ruling of Prof. Lilian Tibatemwa-Ekirikubinza JSC.in civil application No.23 of 2016 made on 6th April, 2017 be varied, reversed, set side and substituted with orders in reference, that the applicant be granted an interim order in the civil application No.23 of 2016, and that the applicant be awarded costs of the reference.

The background to this reference as can be ascertained from the motion is that the applicant filed a Notice of Motion in Civil Application No.23 of 2016, seeking for an interim order pending the hearing of main civil application No.22 of 2016. The learned single Justice Prof. Lilian Tibatemwa-Ekirikubinza, JSC, heard the application and in her ruling delivered on 6th April, 2017, held that the applicant had no right of appeal since there was nothing on record by way of appeal after his notice of appeal had been struck out by Court of Appeal. She found that the competence of the applicant's Notice of Appeal hinged on the right to appeal as provided in the Judicature Act, Sections76 and S.77(1) of Civil Procedure Act and Order 44 rule 1 of the Civil Procedure Rules. She held that the striking out of a Notice of Appeal was not one of the Orders under Order 44 rule 1 of the Civil Procedure Rules from which an automatic right of appeal lies and therefore the applicant had no automatic right of appeal from

the orders of Court of Appeal. She dismissed the application for an interim order and awarded costs of application to the respondent. Hence his reference.

At the hearing of this application the applicant was represented by Mr. Semuyaba Justine from Semuyaba, Iga & Co. Advocates and Counsel Wilfred Niwagaba from Niwagaba Advocates & Solicitors represented the respondent.

Submissions by Counsel for Applicant

In his rather lengthy written submissions, learned counsel for the applicant, submitted that under the Judicature (Supreme Court Rules) Directions, where an application for leave is necessary, it may be made before or after the Notice of appeal is lodged in the Supreme Court and the fact the appellant had not yet sought any leave to appeal from the Court of Appeal could not in itself render his Notice of appeal or subsequent application for interim order incompetent.

He stated that the applicant had sought an interim order because it was evident that the respondent was proceeding with execution of the Judgment, Decree and Orders of the main suit and the applicant had received threats of the respondent executing the same.

Counsel submitted that the learned single Justice erred in law and fact when she held that the applicant did not have an automatic right of appeal against the decision of Court of Appeal.

Counsel also argued that the Hon. Justice erred in holding that there was no Notice of Appeal at the Court of Appeal following its withdrawal by operation of the law under Rule 43(1) (2), 44(10, 82, 83 and 84 of Judicature (Court of Appeal Rules) Directions and section 6(1) of Judicature Act.

He stated that the Hon. Justice erred in law and fact when she misapplied Sections 76(1) and 77 of Civil Procedure Act and Order 44 Rules 1,2and 3 of Civil Procedure Rules which provisions are applicable and extend to proceedings in the High Court and Magistrates Courts.

Counsel submitted that the applicant had an automatic right of appeal to the Supreme Court as second appellate Court after the Court of Appeal had made its decision striking out the Notice of appeal.

Counsel argued that this Court has powers of Court of original jurisdiction from which an appeal emanates and under Article 132(2) of the Constitution, an appeal lies to the Supreme Court from decision of the Court of Appeal and there was no requirement for leave to appeal to the Supreme Court in this matter as it was not an appeal from an interlocutory order and had the effect of disposing of the entire appeal.

He cited the case of **Gashumba Maniraguha VS Nkundiye Supreme Court Civil Application No.24 of 2015,** where this Court held that under the Rules of the Supreme Court, the absence of a certificate or leave does not render an appeal incompetent. He referred to the case of **Hon. Theodore Ssekikubo and Others, Constitutional Application No.6 of 2013** where this court held that under Article 132 of the Constitution, the right of appeal to the Supreme Court is a creature of the Constitution. He also cited the case of **Cheboi Vs Koroko, Civil Misc. Application No. 105 of 2014**, where it was held that under Rule 53 (2) of the Judicature (Court of Appeal Rules) Directions, an application to strike out a notice of appeal or appeal is not an interlocutory matter as the Court of Appeal would have disposed of the entire appeal.

Counsel submitted that the Notice of Appeal was a condition precedent to the institution of an appeal. Without a Notice of Appeal there would be no appeal.

Finally, Counsel for the Applicant faulted the learned single Justice for awarding the costs of the application for an Interim Order to the respondent and prayed that the reference be allowed and the ruling and orders of the single Justice be varied, reversed and substituted with orders made in the reference. He prayed also for applicant to be granted interim order and for cost of this reference in this and in the Court below.

Submission by Counsel for Respondent

Counsel for Respondent Mr. Wilfred Niwagaba in reply opposed the reference and submitted that there is no automatic right of appeal for the applicant. He said the position/ruling taken by the learned single judge was a reflection of the law.

Counsel disputed the applicant's counsels' claim that there was no time to apply for leave to appeal and argued that the **Rule 39(2) of Judicature (Supreme Court Rules) Directions** prescribes a period of 14 days for applying for leave to appeal.

He said the appellant was deemed to have withdrawn his Notice of Appeal when he failed to apply for leave within the time stipulated.

The applicant had no automatic right of appeal and should have come to Supreme Court after applying for leave within the stipulated time.

Counsel for respondent further submitted that the applicant's name has already been removed from the Certificate of Title and replaced with that of the respondent as an administrator of the estate of the late Kristofa Wadda. He said the respondent is in possession of the land following the eviction of the appellant. He added that an Interim Order had been overtaken by events and there was nothing to stay.

Counsel prayed that this Court finds no merit in the reference and dismisses it with costs.

Applicant's Rejoinder

Counsel for the applicant in rejoinder reiterated that striking out of the Notice of Appeal of the applicant was not an interlocutory matter but a final decision, which had the effect of determining the entire appeal in the Court of Appeal and confirming the judgment of the High Court.

He submitted that the applicant was properly exercising his unlimited right of appeal to the Supreme Court against the decision of Court of Appeal under S.8 (2) of the **Judicature Act** and **Rule 52 (1) (b) and 2 of Judicature (Supreme Court Rules) Directions** and that the applicant had an automatic right of appeal from the Court of Appeal to the Supreme Court.

Consideration of the Reference by Court

We have perused the record and considered the submissions by both learned counsel. We have also come across a number of authorities from this Court on interim orders and the principles in this area as expounded in the case of **Zubeda Mohamed & Anor v Wallia & Anor (Civil Reference NO.07 0F 2016)** where this court emphasized the criteria to be followed by this court in granting such orders. It was held that:

> **"In cases of urgency, however, this Court is empowered by Rule 2(2) of the Rules of the Court to issue interim orders in order *"to achieve the ends of Justice"*. Applications for interim orders are heard by a single Justice of the Court. Applications for interim orders are granted pending determination of the substantive application, not the appeal. An interim order is a stop gap measure to ensure that the substantive application is not rendered nugatory. The principles followed by our courts were clearly stated in the celebrated case of Hwang Sung Industries Limited v Tajdin Hussein & Others, SC Civil Application No. 19of 2008 where Okello JSC, as he then was said: "*For an application for an interim stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."***

We also found an instructive summary by this Court in Hon. Theodore Ssekikuubo and others v The Attorney General and others, SC Constitutional Application No. 04 of 2014 where this Court said: *"Rule 2(2) of the Judicature Supreme Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal. In the cases of Yakobo Senkungu and others vs Cerencio Mukasa, SC Civil Application No. 5 of 2013 and _this Court stated that 'the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between the parties determined by the full court as per the Rules" Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the substantive application. Needless to say, there must be a Notice_of Appeal.* See Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SCCA NO. 19 of 2008), (the underling was added for emphasis).In summary, there are three conditions that an applicant must satisfy to justify the grant of an interim order:

1. **A Competent Notice of Appeal;**
2. **A substantive application; and**
3. **A serious threat of execution."**

Before we delve into the issue as to whether or not the application meets the above criteria we will deal with the issue of whether the learned single judge misapplied Section 76 (I) and 77 of Civil Procedure Act. Counsel for applicant submitted at length that the Civil Procedure Act and Rules only apply to the High Court and Magistrates Courts.

Section I of Civil Procedure Act provides that;

"This act shall extend to proceeding in the High Court and Magistrate Courts"

The Civil Procedure Rules Statutory Instrument No. 71 – 1 provides that;

"These Rules shall apply, as far as practicable and unless otherwise expressly provided, to all matters arising and to all proceedings taken on any matter under the Act or any Act amending the Act"

The above section does not in any way limit the application of Act and Rules to the High Court and Magistrates Court. They may also be applied to superior court Section **7 of Judicature Act,** provides that "**For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."**

In the case of **Beatrice Kobusingye v Fiona Nyakana and Anor (Civil Appeal No.5 of 2004)** this court was faced with a similar situation when it had to determine whether the Court of Appeal had wrongly held that section 74 and 75 (now section 72 and 74 of Civil Procedure Act were not applicable to the Court of Appeal. Tsekooko JSC, held that:

"With respect, I cannot appreciate the true cause of misunderstanding concerning the applicability of the provisions of the Civil Procedure Act or its Ss.74 and 75. Nor is there a sound basis for the view that the Civil Procedure Act cannot apply to the Court of Appeal especially in the light of the provisions of the S.11 of the Judicature Act to which I shall revert later.

It is clear from the head note to the Civil Procedure Act that the Act was enacted to make provision for PROCEDURE IN CIVIL COURTS.

The jurisdiction of this Court and the Court of Appeal includes civil jurisdiction. I find nothing in S.1 of the Act which prohibits, in appropriate instances, the application of the provisions of the Act to procedure in either this Court or in the Court of Appeal. In my view, the operation of the Civil Procedure Act must be placed alongside the operation of the Judicature Act and the Constitution..."

From the above, this Court found that Civil Procedure Act and Rules were not limited to the High Court and Magistrates Courts and we agree.

On the issue of whether the learned single Justice rightly applied the Civil Procedure Act and Rules in determining whether or not to grant the interim order, this Court has in the case of **Zubeda Mohammed** (Supra) and a host other cases laid down the criteria to be followed by this Court in determining whether to grant interim orders. These are whether there is a competent notice of appeal, a substantive application; and a serious threat of execution.

On the competence of the Notice of Appeal, this court in **Zubeda Mohammed** (Supra) had to determine whether the applicant had lodged a notice of appeal. It is now settled law that appeal is deemed fully instituted by filing a notice of appeal in the relevant registry.

The learned single Justice was alive to the case of **Zubeda Mohammed** (Supra) on which she heavily relied. However, the learned Justice delved into matters, related to whether the applicant had an automatic right of appeal and whether the applicant had an appeal at the Court of Appeal after his notice had been struck out. Respectfully we find those were beyond the scope of the application before her. She went into the merits of the appeal and determining the appeal itself.

In **Zubeda Mohammed** (Supra) Court held that:

"In <u>Hon. Theodore Ssekikuubo and others v The Attorney General and others</u>, this Court found that the applicants had not

only filed a Notice of Appeal and requested for the record of proceedings of the Constitutional Court, but they had filed an application for a substantive stay of execution which was pending before Court. Court also established from the affidavit evidence that there was an imminent threat of expulsion of the applicants from Parliament. The court granted the application on that basis. In the instant case, we first and foremost find that the application itself was incompetent in so far as the applicants had prayed for an interim order to:

"be granted pending the hearing and determination of the appeal against the Ruling/decision of the Court of Appeal in Civil Application No. 365 of 2015." This was clearly a glaring error since an interim order can only be granted pending disposal of the main application, not the appeal itself..."""

The court further emphasised that in an application for an interim order, the judge must consider all the three conditions above, before reaching a decision to grant or dismiss an application for an interim order.

Upon perusal of the record, we find that the applicant had before filing his notice of appeal in this Court, filed a substantive Civil Application No.22 of 2016. There was a serious threat of execution which has since have taken place. The respondent in his submission confirmed that he has executed the Decree and the title of the suit land is now in his name. He has to that effect taken possession of the suit land.

Therefore while the applicant had fulfilled the conditions for grant of an interim stay of execution, the execution which has already taken place cannot be reversed by an application for an interim stay of execution which by its nature is preventive rather than corrective. After failing to stop the execution the applicant's remedy lies in the Court that carried out the execution and it is for

that reason that we decline to grant the interim order of stay of execution prayed for.

The reference is dismissed with costs to the respondent.

Dated at Kampala this .....18th.....day of .....June.....2018

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MWANGUSYA
JUSTICE OF THE SUPREME COURT

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OPIO-AWERI
JUSTICE OF THE SUPREME COURT

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MWONDHA
JUSTICE OF THE SUPREME COURT