THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Civil Application No. 34 of 2019

(Coram: Arach-Amoko, Tibatemwa, Mugamba, Buteera, Chibita; J.S.C)

OSMAN KASSIM RAMATHAN::::::::::::::::::::::::::::::::::::APPLICANT

AND

CENTURY BOTTLING COMPANY::::::::::::::::::::::::::RESPONDENT

(Application arising from the orders of the Court of Appeal (Egonda-Ntende; Musoke and Obura JJA) delivered on the 19th August, 2019 in Civil Appeal No. 40 of 2010).

RULING OF THE COURT

This application is dated 11th December, 2019 and is premised on Rules 2(2), 6(2) (b) and 42 (1) and (2) of the Supreme Court Rules.

Osman Kassim Ramathan, the applicant, prays that an order staying the execution of the judgment of the Court of Appeal in Civil Appeal No.40 of 2010 be granted, pending determination of his appeal to this Court.

The grounds of the application set out in the Notice of Motion are that:

i) The applicant was the unsuccessful party in Court of Appeal Civil Appeal No.40 of 2010.

ii) The applicant being dissatisfied with the judgment and orders of the Court of Appeal seeks to appeal the decision and has filed a Notice of Appeal in this Court on the 29.8.19.

iii) On the same day, he notified the Court of Appeal Registrar and requested for a typed copy of the proceedings to prepare his appeal but it has not yet been availed to him.

iv) There is a serious threat of execution as the respondents have already initiated the process of execution of Civil Appeal No.40 of 2010.

v) The applicant shall suffer substantial loss and irreparable damage if the application is not granted and execution goes ahead.

vi) That the applicant has a high likelihood in the main application. (sic)

vii) The intended appeal involves a substantial question of law and has a high likelihood of success.

viii) It is in the interest of justice that this application be allowed.

The application is supported by an affidavit affirmed by the applicant on 28th November, 2019 in which he substantially repeated the grounds set out above.

Mr. Apolo Katumba, an advocate from AF Mpanga Advocates, filed an affidavit on behalf of the Respondent sworn on 2nd July, 2020 opposing the application. The main thrust of his affidavit is that the applicant's application is incompetent and has not satisfied the conditions for the grant of the order sought.

There is an affidavit in rejoinder by the Applicant affirmed on 8th July, 2020 averring that his application is competent and meets the conditions for the order sought.

Background

The brief history of the application as far as can be gathered from the record is the following:

The applicant, a beneficiary of the estate of the late Kassim Ramathan and one Mustapha Ramathan, trading as Bombo Wholesalers, instituted Civil suit No. 431 of 2006 in the High Court against the respondent seeking for general damages for breach of contract, special damages of shs. 404,720,567/= for unpaid sums of money, loss of business and profits, interest and costs of the suit. The claim arose from a dealership contract between the parties.

After hearing the suit, the High Court in its judgment delivered on 25th March, 2010, awarded him general damages of shs. 5,000,000/= for breach of contract plus special damages of shs. 5,520,000/= together with interest and half the costs of the suit. Dissatisfied, the applicant appealed to the Court of Appeal but his appeal was dismissed with costs to the respondent. As a result, the respondent filed a Bill of costs for a total of shs. 71,424,338/= which was pending a ruling by the Registrar of the Court of Appeal at the time of instituting this application.

As stated earlier on, the applicant lodged a Notice of Appeal on 29th August, 2019, indicating that he intends to appeal against that judgment. This application is to stay execution of the judgment

and orders of the Court of Appeal pending determination of that appeal.

Representation

At the hearing, the applicant was represented by Mr. Omongole Richard while Mr. Ernest Kalibala from M/s AF Mpanga Advocates represented the respondent. Both counsel filed written submissions which they adopted in court on the date of hearing.

Submissions

In his submissions Mr. Omongole stated the law and the well settled principles by this court regarding applications for stay of execution as summarized in **Gashumba Maniraguha v Sam Nkundiye, SCCA No, 24 of 2015** These are that, apart from filing the Notice of Appeal:

> ***"(1) The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal.***
>
> ***(2)It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.***
>
> ***(3)If 1 and 2 above have not been established, Court must consider where the balance of convenience lies.***
>
> ***(4)That the applicant must also establish that the application was instituted without delay."***

Relying on the applicant's affidavits, counsel submitted that the applicant has met the above conditions as he has shown that his

appeal has a high likelihood of success because it raises serious questions of law relating to special damages, evaluation of evidence on special damages as well as other matters related to the legal status of the applicant's operation of business which the lower courts did not conclusively address. He submitted that if the application is not granted the appeal will be rendered nugatory.

He further submitted that the respondent has already initiated the process of execution by filing its bill of costs and that the parties await a ruling on the same. This shows that there is a real threat of execution before the appeal is heard and that the applicant will suffer irreparable damage if the decision of the Court of Appeal is not stayed.

Regarding the balance of convenience, counsel submitted that it was in favour of the applicant who would be inconvenienced by the execution process yet his appeal has a high likelihood of success.

Counsel also submitted that the application was instituted without delay.

Counsel concluded by inviting this Court to find that the applicant has fulfilled the conditions for the grant of stay of execution and prayed that the same be granted.

On his part, Mr. Kalibala agreed with the law and the principles laid down by this Court in **Gashumba Maniraguha v Sam Nkundiye (supra)** but strongly opposed the application. Counsel contended that although this Court enjoys concurrent jurisdiction with the Court of Appeal in respect of applications for stay of execution, Rule 41(1) of the Rules of this Court requires the applicant to seek the orders of stay of execution in the Court of

Appeal first. He submitted that this application is therefore incompetent before this Court because the applicant did not comply with Rule 41(1) of the Rules of this Court and never advanced any reason or exceptional circumstance for non-compliance. He prayed that the application should be dismissed with costs for this reason. Counsel relied on the case of **Attorney General & Electoral Commission v Eddie Kwizera, SSCA No.1 & 3 of 2020** for this contention.

Counsel submitted that the above notwithstanding, the application was also incompetent as the affidavit in support is permeated by falsehoods in paragraphs 1,3,16 and 18 and the applicant had not made any effort to correct it in his affidavit in rejoinder.

Turning to the merits of the application he submitted that although this Court has a wide discretion to grant such orders, in order to succeed an applicant must place the relevant material before Court to enable Court to exercise its discretion in his or her favour. He argued that this was not the case in the instant application. He added that an appeal would not be rendered nugatory merely because there is an unfettered right of appeal and a stay is not granted. He contended that an order for stay of execution is relevant where the appeal would be so negatively affected that it would effectively become irrelevant to pursue after execution has taken place, which is not the case in the instant appeal.

Regarding its likelihood of success, he argued that the applicant's application fell short of meeting that requirement because other

than just merely stating so in his affidavit, the applicant did not place any material before Court to show the likelihood of success such as the proposed grounds of appeal or a draft Memorandum of Appeal. He submitted that it is thus inconceivable that an appeal whose basis is unknown would be rendered nugatory.

Regarding the alleged imminent threat of execution and irreparable damage, counsel submitted that the applicant had not shown the property or business that was under threat of execution. He contended that the applicant has also not shown the imminent threat of execution since there is no order from the Court of Appeal apart from that dismissing his appeal. He submitted that the executable order would be the one from the order for the costs of the appeal, but hastened to add that the bill of costs filed on behalf of the respondent was yet to be taxed by the Registrar of the Court of Appeal. According to counsel the applicant is specifically trying to avoid payment of costs in respect of instruction fees of shs. 60,500,000/= which is yet to be ascertained. Counsel contended that this application is therefore speculative and premature because the taxation process is ongoing.

Counsel therefore invited this Court to dismiss the application with costs to the respondent. He relied on the case of **Mohammed Mohammed Hamid v Roko Construction Ltd, Misc. Application No.23 of 2017(SC)** in support of this submission.

In a brief rejoinder, Counsel for the applicant reiterated his earlier submissions regarding the likelihood of success.

He contended that the application was competent as this Court has power to entertain such a matter pursuant to Rule 41(1) and (2) of the Rules of this Court. He contended that Rule 41(2) thereof specifically gives this Court discretion to entertain such applications even if they were not made to the Court of Appeal first arguing that each case is considered on the basis of its peculiarities.

Regarding the alleged falsehood in the applicant's affidavit in support of the application, counsel argued that they were mere technicalities and errors which were effectively cured by the applicant in his affidavit in rejoinder. In addition to that, counsel invited Court to invoke the provisions of Article 126 (2) (e) of the Constitution and determine the application on merit.

Regarding irreparable damage or the possibility of rendering the appeal nugatory, counsel submitted that execution was a process. He added that every judgment of court takes effect immediately upon pronouncement and that every court has inherent powers to proceed to enforce such judgment at once.

Counsel further submitted that although the Court will not without good reason delay a successful litigant from enjoying the fruits of his or her judgment, it has power to grant a stay of execution if justice required that the person against whom the judgment is to be enforced should be protected. Counsel therefore reiterated his argument that irreparable loss would be occasioned to the applicant if the application is not granted due to the exceptional circumstances of this application and in the interest of justice.

Counsel also submitted that the authority of **Mohammed Mohammed** (supra) was thus distinguishable in the circumstances.

Regarding the balance of convenience, counsel further argued that since counsel for the respondent did not submit on this principle, it clearly showed that indeed the balance of convenience was in favour of the applicant.

He reiterated his earlier prayers.

Consideration of the application by Court.

The jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2) (b) of the Rules of this Court which provides that:

> **"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 72 of these Rules, order a stay of execution,... as the court may consider just."**

The procedure is found in Rule 41 of the Rules which reads:

> **"41. Order of applications to the court and to Court of Appeal.**

(1) Where an application may be made either to the court or to the Court of Appeal, it shall be made to the Court of Appeal first.

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

The issue for determination by the Court is whether the applicant has met the conditions for the grant of an order for stay of execution.

We have carefully considered the application, the submissions of counsel on both sides, the affidavits on record and the relevant case law in this regard. These are our findings and conclusions:

The competence of the application.

It was the respondent's contention that this application is incompetent before this Court saying it should have been made to the Court of Appeal first as required under Rule 41(1). The applicant on the other hand argued that the application is competent under Rule 41(2) and did not require being made to the Court of Appeal first, contending that this Court has wide powers to entertain such applications and that each case is considered on its own peculiarities.

This Court interpreted this Rule in **Lawrence Musitwa Kyazze v Eunice Busingye, Supreme Court Civil application no.18 of 1990** which has been followed in numerous applications and recently in **Attorney General & Electoral Commission v Eddie Kwizera No. 1 & 3 of 2020** where the Court observed as follows:

> ***"Rule 41(1) provides for the general rule in instances where there is concurrent jurisdiction of the court of Appeal and the Supreme Court. It is couched in mandatory terms and requires that an applicant files such application in the lower court first.***
>
> ***The reason behind rule 41(1) is that it is not only convenient for an applicant to make the application for stay of execution orally at the time of delivery of the decision sought to be stayed but also that the Court that heard the case and made the decision is better appraised with the facts of the case and would therefore be better placed to determine the application for stay of execution promptly. (See Lawrence Musitwa Kyazze v Eunice Busingye, Supreme court Civil application no.18 of 1990)***
>
> ***Rule 41(2) states, among other things, that notwithstanding the existence of sub rule (1) the supreme Court may, in its discretion, entertain an application under rule 6(2)(b) of the rules to safeguard the right of appeal in circumstances where no application has first been made to the court of appeal.***

The effect of the phrase "notwithstanding" is that there are exceptions to the general rule.....

Rule 41(2) is not intended to negate or render Rule 41(1) redundant and thus cannot be read in isolation of rule (1). The Sub rule, while acknowledging the general position of the law as envisaged in sub rule (1), takes cognizance of the fact that there are circumstances where the interests of justice would not be served through strict adherence to sub rule (1). Both provisions of this rule should therefore be read in totality in order to derive the intention of the drafters.

Consequently, an applicant who proceeds under Rule 41(2) - an exception to the general rule must establish that they were aware of the general rule but had good cause for coming straight to the Supreme Court.....

An applicant must establish exceptional circumstances to warrant the court to exercise its discretion under Rule 41(2)."

We are not satisfied with the reason advanced by the applicant why he rushed to file this application in this Court instead of the Court of Appeal. As guided by the decision of **Attorney General & Electoral Commission v Eddie Kwizera (supra)**, this application fails on that ground alone.

False affidavit

It was the respondent's contention that the affidavit in support of the application was permeated by falsehoods. We have perused

the Notice of Motion and applicant's affidavits and find that there are indeed errors pointed out by counsel for the respondent and several others as a result of careless drafting by Counsel. These are not falsehoods. As counsel for the respondent pointed out, the applicant for instance, is described as "a *Director of the applicant...*", yet he is a person.

In paragraph 3, the applicant deponed that "*judgment was entered in favour of the respondent*" in the High Court yet the Judgment indicates that it was in his favour and he was awarded damages and costs.

In paragraphs 16 and 18, he deponed that " *justice demands that ... stay of execution in Civil Suit No.297 of 2016 pending determination of Civil Appeal No 119 of 2019*", yet the correct reference is HCT Civil Suit No. 431 of 2016 and Civil Appeal No, 119 of 2019 (CA), respectively.

He then concludes in paragraph 19 that "whatever... is true and correct...."

Other errors are right from the first paragraph of the Notice of Motion where the reference number of the application is left blank and the prayer (a) and ground 7 are actually for an interim order "*pending determination of Civil Application No... of 2019 for stay of execution.*"

Counsel for the respondent raised the issue of these errors in his affidavit in reply but the applicants' counsel did not make any effort to correct them. We have considered them and find that they do not go to the root of the application because the correct information is on record. In any case, it is trite that the

carelessness or negligence of counsel should not be visited on the litigant.

The merit of the application

The application is based on Rule 6(2) (b) of the Supreme Court Rules. In **Gashumba Maniraguha v Sam Nkudiye (supra),** we stated that:

> ***"This Rule gives this Court, the discretion, in civil proceedings, where a notice of appeal has been lodged in accordance with Rule 72 of the Rules of this Court, to order stay of execution in appropriate cases and on terms that it thinks fit. Like all judicial discretion, it must be exercised on well-established principles. It is the paramount duty of court to which an application for stay of execution pending appeal is made to see to it that the appeal, if successful, is not rendered nugatory."***

As rightly agreed by the parties, this Court has laid down the principles that guide our courts in applications for stay of execution in many cases including **Gashumba Maniraguha v Sam Nkudiye (supra)** relied on by counsel for the applicant. We need not repeat them here.

Likelihood of success

It is trite that in order to succeed on this ground, the applicant must, apart from filing the Notice of Appeal, place before Court material that goes beyond a mere statement that the appeal has a likelihood of success. In the instant case, we find that the applicant filed a Notice of Appeal on 29th August, 2019 indicating that he

intends to appeal against the whole judgment and orders made thereunder. We find that the applicant has deponed in his affidavit in support specifically paragraph 15 that:

"15. *I am advised by my lawyers which advice I verily believe to be true that there are important questions of law in the pending appeal to be determined by the Court and the applicant has a likelihood of success.*"

Apart from the above averment, Counsel for the applicant did not avail to Court the record of proceedings and yet he informed Court that he had received the same on 7th July,2020 two days before the hearing of this application, that is 9th July, 2020. The hearing of the application was later adjourned to 30th July, 2020. All that notwithstanding the applicant did not find it necessary to attach to his affidavit in support of the application a draft Memorandum of Appeal to indicate the proposed grounds of appeal or a copy of the Court of Appeal judgment from which this Court would glean the possible questions to be raised on appeal. The important questions of law are not even mentioned in his affidavits so as to give this Court an idea about the possible ground of his intended appeal. We are, in the circumstances, unable to establish the likelihood of success in the absence of evidence.This ground was thus not satisfied.

Irreparable damage/ nugatory appeal

The applicant has deponed in paragraph 11 of his affidavit in support of the application that:

"11. There is a serious threat to the applicant's property and business..."

The applicant does not mention the property or business so threatened. Besides, there is no order on record that the respondent can execute against the applicant since the bill of costs was yet to be taxed. Even at the time of hearing this application on the 30th July, 2020 no taxation had taken place.

We also find that the applicant, apart from averring that he stands to suffer irreparable damage and that his appeal will be rendered nugatory if the stay is not granted, did not illustrate the damage likely to be suffered by him if the application is denied.

We agree with counsel for the respondent that it is not sufficient for the party against whom the judgment has been given to merely state in his or her affidavit in support that if execution proceeds there may be some irreparable loss caused. The applicant has to prove by affidavit evidence that he or she will suffer irreparable loss if the status quo is not maintained.

In this case the applicant failed to satisfy this condition as well.

Balance of convenience

The status quo is that the Court of Appeal has dismissed the applicant's appeal with costs to the respondent. He is in the process of filing an appeal to this Court against that decision. However, in the absence of any document indicating the grounds of the intended appeal on record, we are of the view that the balance of convenience favours the respondent which has a judgment in its hands.

Delay

There is no dispute over this. Counsel for the respondent acknowledged in his submission that the application was brought without delay.

Conclusion and Orders

Consequently, upon our findings above, we find no merit in the application and our final orders are that:

1) The application is dismissed.

2) The interim order dated 13th March, 2020 in Misc. Application No. 35 of 2019 is hereby vacated.

3) The costs of both applications shall abide the outcome of the appeal.

Dated at Kampala this.....7th.....day of.....October.....2020

Arach-Amoko

JUSTICE OF THE SUPREME COURT

Tibatemwa- Ekirikubinza

JUSTICE OF THE SUPREME COURT

Mugamba

JUSTICE OF THE SUPREME COURT

Buteera

JUSTICE OF THE SUPREME COURT

Chibita

JUSTICE OF THE SUPREME COURT