

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 5 OF 2013

(Arising from Miscellaneous Application No. 4 of 2013, arising from Court of Appeal Civil Appeal No. 36 of 2010: Crescensio Mukasa v John Rwakamuranga & Ors.)

YAKOBO M.N. SENKUNGU

JAMES KENTURA

JOHN RWAKAMURANGA

MISAKI RWAMPIGAaNE

GIRADESI KATONYA

YOHANA RWAKAARO

..... APPLICANTS

Versus

CRESCENSIO MUKASA

.....

RESPONDENT

RULING OF DR. KISA AKYE, JSC.

The applicants brought this application seeking for an interim order from the court to stay execution of the Decree issued in Court of Appeal Civil Appeal No. 35 of 2006, pending the determination of Misc. Application No. 4 of 2013. The

contended that his client had received information that the respondent was planning to execute the Decree, but they did not have any documentary evidence to back up this information.

Relying on the ruling in *Margaret Kato & Another v Nulu Nalwoga, Supreme Court Misc. App. No. 11 of 2011*, where this court stated that it is in the interest of justice to allow stay of execution pending the disposal of the appeal, counsel for the applicants prayed that the application be allowed.

Counsel for the respondent opposed the application and drew the court's attention to the respondent's affidavit in reply, which is on record. He argued that the application lacks merit because the applicants had failed to show any ground upon which the court should exercise its discretion to grant an Interim Order of Stay of Execution. He reiterated the two part test set by this court before it can grant an Interim Order for stay execution. He contended that this test requires court should be satisfied that an applicant has filed a substantive application and secondly that there is a serious threat of execution of the decree before the hearing of the substantive application for stay. He relied on the rulings in *Kitende Kalibogha & 2 Ors v Eleonora Wisemire, Supreme Court Civil Application No. 6 of 2010*, and *Hwan Sung Industries Ltd v Tajdin Hussein & Ors, Supreme Court Civil Application No. 19 of 2008*, to submit that the applicants have failed to satisfy both grounds. He contended that there is no averment in the Notice of Motion and in the Affidavit in Support of the Motion that there is a substantive application before this court for a stay of execution and that there was only submission from the bar that such an application exists. He contended that according to *Kitende* (supra), failure by an applicant to make this averment is a fatal omission which

application was brought under Rules 2(2), 5, 40(1), 41, 42 and 43 of the Judicature Supreme Court Rules.

The application is supported by several grounds set out in the Notice of Motion and in the supporting Affidavit of the 6th applicant, Yonah Rwakaako dated 2nd April, 2013. The first ground on which this application is based is that while the applicants filed their Notice of Appeal in the Court of Appeal on 30th July 2010, the applicant inadvertently failed to file the Notice of Appeal in the Supreme Court. The second ground is that the applicants have since filed their application in this Court seeking for leave to extend time to file the Notice of Appeal in this court. The applicant's third ground is that the Decree in Court of Appeal Civil Appeal No. 36 of 2006 was not extracted in time, due to an application which had been filed by the respondents. The last ground on which the application is based is that it is in the interests of justice to grant the applicants the Interim Order they are seeking from this court.

The applicants were represented by Mr. John Kawanga of Kawanga & Kasule Advocates and Legal Consultants, while the respondent was represented by Mr. Paul Kuteesa of Ntende, Owor & Co. Advocates.

In support of this application, counsel for the applicants submitted that the essence of the application was that a Notice of Appeal was filed in time in the Court of Appeal, but that it has never been filed in this court. He further submitted that they, as counsel for the applicants, had also not prepared the record of appeal due to the applications which the respondent filed, after the judgment of the court of appeal was delivered. He contended that the applicants are ready to file their substantive appeal and had already filed Misc. Appeal No. 4 of 2013, seeking for extension of time to file the Notice of Appeal in this court. Furthermore, he

cannot be cured by counsel's submission from the bar. He argued that court ought to dismiss this application on this ground alone.

Counsel for the respondent also contended that the applicants had also failed to satisfy the second part of the test. He contended that there is nothing in the Notice of Motion or the Affidavit in Support thereof to demonstrate that a threat that the respondent was likely to execute the decree exists. He argued that counsel for the applicant's submission from the Bar cannot cure this defect.

He further submitted that the applicants have been guilty of dilatory conduct and court ought not to exercise its discretion in their favour. He prayed that the application be dismissed because the applicants have failed to show that there is a serious threat of execution. He prayed for the costs of this application.

In reply, Mr. Kawanga submitted for the applicants that the respondent had not denied the applicant's contention that the respondent intends to execute their decree, as is evident from paragraph 4 of the respondent's Affidavit in Reply. In response to Court's inquiry, counsel for the applicants further informed court that the Decree in Court Appeal Civil Appeal No. 36 of 2006 has since been signed. He was ordered to file a copy of the same in court not later than 24th April 2013. He duly complied with this order.

Having considered the submissions of counsel for both parties, I am satisfied that the applicants have established that they lodged a Notice of Appeal against the judgment issued in Civil Appeal No. 36 of 2010 by the Court of Appeal; that there is a substantive application pending before this court seeking for, among others, a stay of execution and that there is a threat that the respondent will seek to execute the decree in Civil Appeal No. 36 of 2006, now that a Decree has been issued.

Contrary to counsel for the respondent's contention, I find that the applicants averred both in the Notice of Motion in the Order sought for and also in paragraph 15 of Rwakaaro's affidavit in support of the Notice of Motion, that there are seeking an interim stay of execution pending the determination of Civil Application No. 4 for extension of time and stay of execution. I do however agree with counsel for the respondent that there has been dilatory conduct on the part of counsel for the appellants in pursuing the applicants' intended appeal. Counsel for the applicant's contention that they were prevented from filing the appeal because the respondent had filed an application in the Court of Appeal, is not valid, since Rule 86(3) of the Rules of this Court expressly permits an appellant to file a Supplementary Record of Appeal at any time.

In the interests of justice, I will, however, not penalize the applicants for the actions of their counsel. I allow the application and order as follows:

- (1) An interim order staying the execution of the Decree is granted to last for a period of 30 days from the date of issue of this order.
- (2) The applicants are ordered to take the necessary steps to move the Registrar to fix Civil Application No. 4 of 2013 before the Interim Order expires.
- (3) If the Court is not able to fix the hearing of Civil Application No. 4 of 2013 within 30 days from the date of this order, the interim order will automatically extend to the date where the hearing of the said Application is fixed by the Court.

- (4) The applicants will be at liberty to seek for extension of the order staying execution of this Decree from court when the hearing of Civil Application No. 4 of 2013 commences.
- (5) Costs of this application are awarded to the respondent.

Dated at Kampala this27th..... day ofSeptember..... 2013.



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HON. DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT