

UGANDA / JUDGMENT

Kunsa v Uganda (HCT-00-AC-CM 51 of 2023) [2024] UGHACAD 7 (23 July 2024)

[2024] UGHACAD 7

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Okuo-Kajuga, J

CASE / FILE NUMBER

HCT-00-AC-CM 51 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA ANTI-CORRUPTION DIVISION HCT-00-AC-CM-0051-2023 ARISING FROM HCT. OO. AC-SC-0003-2016

KIWANUKA KUNSA STEPHEN :..... APPLICANT

VERSUS

UGANDA (ODPP) RESPONDENT

BEFORE: HON. LADY JUSTICE OKUO JANE KAJUGA

RULING

Introduction:

This is an application for stay of execution of an order of compensation arising from the decision of the Hon. Lady Justice Margaret Tibulya in HCT-00-AC-SC-003-2016, pending the determination of Supreme Court Criminal Appeal No 3812027.

The application is brought by Chamber summons under section 98 of the Civil Procedure Act and Order 22 rule 23 (1) of the Civil Procedure Rules, supported by an affidavit deposed by the applicant on the 11th of July 2023.

The grounds on which the application is based are that:

- 1. The applicant has filed an appeal against the decision of the Court of Appeal delivered in Criminal Appeal No 5/2019

- 2. The appeal has a high probability of success as the learned Justices of the Court of Appeal erred in law and fact, and failed to correctly evaluate the evidence on record thus arriving at wrong conclusions

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- 3. The respondent/ judgement creditor has commenced execution proceedings against the applicant and if an order for stay is r.rot granted, it will render the appeal in the supreme court nugatory
- 4. That it is in the interest of iustice and equitable that this application is granted.

Background:

The applicant and others were convicted of corruption offenses. An order of compensation for Ushs 3,495,680,0661= to the Government of Uganda was issued against him. An appeal against the judgement and orders of the trial Court was lodged. The Court of Appeal upheld the conviction and compensation order hence the appeal to the Supreme Court.

Following the decision of the Court of Appeal, the Office of the Director of Public Prosecutions filed an application for execution vide ACD Execution Miscellaneous Cause No 412023. The Registrar consequently issued a Notice to the applicant to show cause why execution should not issue.

The application for stay of execution was prompted by the above developments.

Representation:

fohn Isabirye and Kennedy John Babumba for the applicant

Annette Namatovu Ddungu (Chief State Attorney- ODPP) for Respondent

Both parties made oral submissions which are set out in detail on the court record

Preliminaryr obiection

Counsel for the respondent raised a preliminary point of law challenging the jurisdiction of this court to handle the application for stay. She contended that the law governing stay of executions in cases on appeal to the Supreme Court is the Judicature (Supreme Court Rules) Directions SI 13-11.

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She further argued that the application had been brought under the wrong law, specifically under Order 22 r 23 (1) of the Civil Procedure Rules, and that the interim remedy provided thereunder was granted by the Registrar of the Anti-Corruption Division on 3 I 1 1. 12023 and lapsed on 3 l'1212023.

She contended that Order 43 r 4 of the Civil Procedure Rules, which is the right law governing stay of execution in the High Court, only grants the High Court jurisdiction where the appeal is substantially before it. In the instant case, the appeal is not before the High Court.

She prayed that court dismisses the application for want of iurisdiction.

In reply, counsel for the applicant submitted that the objection on jurisdiction is misconceived and that Section 34 (1) of the Civil Procedure Act provides that all questions arising between the parties to the suit in which a decree has been passed and relating to execution shall be resolved before it. He submitted that this provision vests this court with jurisdiction to hear and dispose of the application.

He conceded that they ought to have filed this application under Order 22 r 26 and not rule 23, as it provides that where a suit is pending in any court between the decree holder and judgement debtor, the court may stay execution of the decree until the pending suit has been determined.

He submitted that both the High Court and the Supreme Court are competent to handle the application. To support this position, he cited, rather out of context, the Judicature (Court of Appeal Rules) Directions, Rule 41 (2) thereof to support his position. This Rule provides that where an application may be made either in the High Court or the Court of Appeal, it shall first be made in the High Court.

He prayed that the Court dismisses the preliminary objection and determines the application for stay.

Determination of court:

It is trite law that points of law can be raised at any stage of the proceedings and may be argued whether or not they were set out in the pleadings. *sec Mathias Lwanga Kaganila oersus LIEB CS No 124/2003; saggu oersus Roadmaster cycles (u) Ltd t200211 EA 2s8*

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The court hearing the matter has the discretion to dispose of the preliminary point first and I have, in the circumstances of this case opted to do so since the question of jurisdiction stands at the very core or foundation of any proceedings'

It is imperative to note that the appeal from which execution lies in this case is criminal in nature. It is an appeal filed in the Supreme Court challenging the decision of the Court of Appeal, and both the conviction and the order of compensation are the subject of appeal as deduced from the affidavit in support of the application and submissions of counsel for the applicant.

Rule 6 (2)(a) of the Judicature (Supreme Court Rules) Directions provides as follows:

"subject to sub rule 1 of this rule, the institution of an appeal shall not operate to suspend a sentence or stay execution, but the court may in any criminal proceedings, where notice of appeal has been given in accordance with rules 56 and 57 of these Rules, order that the appellant be released on bail or that the execution of a sentence be deferred pending the determination of an appeal."

The above provision expressly vests the supreme Court with the jurisdiction to order a stay of execution where there is a criminal appeal pending before it.

Counsel for the respondent sought to argue this matter as if it is purely a civil appeal and seemed not to take cognisance of the fact that there is a specific law governing the procedure of appeals and related applications in the Supreme Court.

He cited Rule 42 (1) of the Judicature (Court of Appeal Rules) Directions as persuasive authority. It provides that whenever an application may be made either in the High Court or Court of Appeal, it shall first be made to the High Court. This provision was with due respect quoted out of context. The Rules cited do not apply in this matter. Rule 41 (1) of the supreme court Rules which corresponds with the Rule cited by the respondent, states that where an application may be made first either to the Court of Appeal or the Supreme Court, it shall be made to the former first. There is no reference to the High Court in these Rules.

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I have carefully considered the provisions of Section 34 (1) of the Civil Procedure Act Cap 71 which counsel also relied on as vesting jurisdiction in this court to issue a stay of execution. It provides:

"All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit"

The import of this provision was explained in *Francis Micah V Nuwa Walakira* SCCA NO 24 11994 which cited Rao's All India Reporter commentaries on the Indian Code of Civil Procedure Vol 1 10th Edition, cited by Justice Odoki in Miscellaneous Application No 0034 I 2023, as;

"sparing unnecessary expense and delay and to afford relief to the parties finally, cheaply and speedily without the necessity of a fresh suit, it must be construed liberally as the language would reasonably admit. It embraces all matters connected with the execution of an existing decree between the parties or their representatives, and covers all questions relating to the execution, discharge or satisfaction of the decree,

From the foregoing, I am unable to see how Section 34 of the CPA applies in the instant case where there is an appeal against the decision of the Court of Appeal, challenging the compensation order from which execution arises. That appeal, cannot be understood to be a question relating to the execution or satisfaction of the decree, rather, the decree is contested as unlawful through the appellate process. Section 34 (1) of the CPA is quoted out of context and does not apply either.

Neither does Order 22 rule 26 apply as it relates to a stay where there is a pending suit against the holder of the decree.

Conclusion:

Parties have no power to vest court with jurisdictional competence or authority to hear cases. see Mwayire Nakana and Co Advocates versus Departed Asians Custodian Board (1991) HCB 91. Lack of jurisdiction goes far beyond an error/ omission or irregularity nor can it be regarded as a mere technicality. Proceedings

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and decisions of a court without jurisdiction are a nullity. see Desai versus Warsama (1967) EA 351

This court is not vested with the jurisdiction to grant a stay of execution where there is a criminal appeal pending in the Supreme Court. I uphold the objection raised by Counsel for the respondent, and this disposes of the entire application.

The application is dismissed for want of jurisdiction'

Delivered this 23'd day of July 2024

Jane Okuo Kajuga

Judge

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