

UGANDA / JUDGMENT

Lweza Clays Ltd & Anor v Tropical Bank Ltd & Anor (Civil Application 31 of 2018) [2019] UGSC 12 (19 February 2019)

[2019] UGSC 12

COURT

Supreme Court of Uganda

CASE / FILE NUMBER

Civil Application 31 of 2018

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THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA HOLDEN AT
KAMPALA

(CORAM: BUTEERA, JSC. SINGLE JUSTICE)

MISC. CIVIL APPLICATION NO. 31 OF 2018 Arising from Civil Application No. 30 of 2018 Arising from Civil Appeal No. 15 of 2018.

BETWEEN

1. LWEZA CLAYS LTD 2. KIZITO LUTWAMA MOUSSA:.....

AND

1. TROPICAL BANK LIMITED

2. FRED MUWEMA:.....

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(Arising from the Judgment and decision of the Court of Appeal of Uganda in Civil Appeal No. 91 of 2009 dated 3rd September 2018 before Justice Owiny Dollo DCJ, Justice Remmy Kasule and Justice Kenneth Kakuru JJA)

RULING OF BUTEERA, JSC.

This is an application by Notice of Motion seeking for orders that:

1. An Interim Order be granted against the respondents and their agents, servants and/or employees from further enforcing, foreclosing on the mortgage or enforcing the debenture and thus maintain the status quo pending the hearing and determination of the formal application for a temporary injunction pending in this Court vide Miscellaneous Application No. 30 of 2018 and or until the final disposal of Civil Appeal No. 15 of 2018 in this Honorable Court or and until such further Orders of this Court.
- 2. That the proceedings of the High Court Civil Suit No. 300 of the 2008 ordered to be restarted by the Court of Appeal vide Civil Appeal No. 91 of 2009 be stayed pending the hearing and determination of the Appeal in the Supreme Court.
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3. Costs of this application be provided for.

BACKGROUND

In 2007 and thereafter the 1st respondent, a Commercial Bank, extended financial facilities secured by mortgage and debenture to the 1st applicant, a 10 company manufacturing clay building products. The 2nd applicant is the Chairman/Managing Director of the 1st applicant. On 31.10.2008 the 1st respondent asserting that the applicant had breached the repayment of loan obligations and acting under the terms of the mortgage and the debenture placed the 1st applicant into receivership and appointed the 2nd respondent as 15 receiver/Manager to recover the monies owed to the 1st respondent.

The applicants through HCCS No. 300 of 2008 (Commercial Division) contended that their being placed into receivership was wrong in law and fact since the mortgages and/or debentures upon which the receivership was based, were null and void under the law. Messrs ASKAR Security Services Limited, a security company, employed by the applicants to keep the respondents off the factory premises, was added to the suit as a co-defendant. The respondents, not admitting to the applicant's claims, filed written statements of defense and a counter-claim to the suit.

Before the said suit was heard, the applicants lodged in court Miscellaneous Application No. 99 of 2009 seeking dismissal of the main suit for being founded

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on the debenture and mortgage tainted with fraud and thus null and void. The respondents filed a reply in opposition of this application.

The parties, on order of the trial judge, filed written submissions in the application and on 07/09/2009, the Judge delivered a ruling in the application 5 holding the mortgage and debenture upon which the appellants based their placement of the 1st respondent into receivership as well as the counter-claim to be null and void for non-payment of stamp duty upon them.

The judge also awarded substantial general damages and costs to the applicants. 10

Dissatisfied by the decision, the respondents appealed to the Court of Appeal which resolved in their favour and set aside the ruling of the trial Judge dated 07/09/2009 in Miscellaneous Application No 99 of 2009 as well as all orders made in that ruling.

Court further ordered that HCCS No. 300 of 2008 be reinstated on the cause list and that the said suit as well as Miscellaneous Application No. 99 of 2009 be tried **de novo** by the High Court before another High Court Judge.

The Court ordered that since the parties are still involved in litigation mainly due to the way the trial was handled in the High Court, each party should bear its costs of the appeal and those in the High Court.

THE GROUNDS OF APPLICATION.

The grounds in support of this application are contained in the Notice of Motion supported by an affidavit deposed by the second applicant, Kizito Lutwama Moussa, and they are as follows:

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- (1) THAT the Applicants are dissatisfied with the Judgment and orders of the Court of Appeal of Uganda in Civil Appeal No. 91 of 2009, Ms Tropical Bank Ltd and Another vs Lweza Clays Ltd and Another, made on the ³ September 2018.
- (2) THAT the Applicants have duly filed a Notice of Appeal in the Court of Appeal and in this Court in accordance with the rules of this Court.
- (3) THAT the applicants have duly served the aforesaid Notice of Appeal 10 and a letter requesting for proceedings to the respondents Counsel.
- (4) THAT the respondents have since the decision of the Court of Appeal commenced the process of foreclosure on the mortgages by issuing formal statutory demands to the Applicants.
- (5) THAT the applicants shall suffer irreparable damage if the actions of the Respondents or their servants or agents are not restrained.
- (6) THAT the appeal against the decision of the Court of Appeal in this court shall be rendered nugatory if the respondents and their servants or agents are not restrained of their actions pending the hearing and determination of the appeal.
- (7) THAT the applicants Intended Appeal raises serious points of law and fact and has a high chance of success. As Appellant's Cross Appeal was never ruled upon and first respondent has since the decision of the Court of Appeal paid stamp duty and court filing fees

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which is a tacit acknowledgement of its earlier wrong doing which has been the subject of investigation and the decision by the courts.

- (8) THAT this application is made promptly without any delay, and the applicants have filed formal Application for temporary injunction and stay of proceedings in the Supreme Court.
- (9) THAT if an interim order is not issued then the main application and the appeal thereof shall be rendered nugatory and the applicant will suffer injustice.
- (10) THAT it will be just and equitable that the status quo be maintained since the first respondent also filed a counter claim against the Applicants which is yet to be determined by the High Court and any attempt by the first respondent and its servants to work outside arbitrarily and unilaterally amounts to abuse of judicial process.
- (11) THAT the Court of Appeal in its decision ordered a retrial of the suit de novo in the High Court and it will be improper for the High Court to proceed with retrial while this application, main application and the appeal are still pending hearing and determination in the Supreme Court.
- (12) THAT the applicants will be more inconvenienced by the respondents if the injunctive order is not granted, and the securities are presently deposited in court.

(13) THAT it is in the interest of justice that this application is granted.

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REPRESENTATION

At the hearing of the application, the first applicant was represented by learned Counsel, Mr. Edmond Wakida appearing together with Mr. Justin Semuyaba.

Mr. Timothy Masembe Kanyerezi assisted by Timothy Lugayizi appeared for \$\mathsf{S}\$ the first respondent.

The first respondent was represented in Court by its Assistant Manager (Legal) Mr. Asuman Bamweyana. The \$2^{\text{nd}}\$ applicant was present in court.

Preliminary objections on points of law.

At the commencement of the hearing of the application learned counsel for the respondent raised three preliminary objections on points of law.

- The first objection was that under Rule 41(1) of the rules of this Court, the 15 Court of Appeal and this Court have concurrent jurisdiction to entertain the instant application and in such a scenario the application should have been filed in the Court of Appeal first.

- Counsel submitted that if the applicants were not happy with being referred 20 back to the High Court for hearing **de novo**, their first option should have been to file the instant application in the Court of Appeal. They could only come to this Court if they demonstrated that they had first made the application in the Court of Appeal and their application in that court had failed or that the application could not be heard in time by the Court of Appeal. He supported his 25 submission with the following authorities:- *Ganafa Peter Kisawuzi vs DFCU Bank Limited* Civil Appeal No. 0064 of 2016, *Lawrence Musiitwa Kyazze vs Eunice Busigye*, SCCA No. 18 of 1990 and *Kyambogo University vs. Prof Isiah Omolo Ndiege* CACA No. 341 of 2013.

Counsel contended that the applicants did not adduce any evidence that they had filed their application at the Court of Appeal and had attempted to have it fixed for hearing but the application could not be heard despite their efforts. Mere speculation that the Court of Appeal would not have heard their application in time was not enough to justify the filing of this application in this Court first without having filed the same in the Court of Appeal. Counsel prayed that Court finds that this application is incompetent before this Court on that ground alone and the same should be dismissed.

The second preliminary point of objection by counsel was that this application 10 was with the objective of getting an injunction stopping a sale of mortgaged property.

According to counsel, in an application of this nature the applicant must have deposited in Court a security of 30 % of the forced sale value of the mortgaged 15 property or the outstanding amount pursuant to regulation 13(1) of the Mortgage Regulations. Counsel contended that the applicants here had not made the security deposit as required by the mortgage regulations and their application should therefore be dismissed for failure to comply with the law.

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The third preliminary point of objection raised by counsel was to the effect that, the applicant cannot seek to stay the High Court proceedings pending the appeal by this application before a single Justice. That an application for an order of stay of proceedings pending appeal can only be granted by a full bench of this Court.

Counsel was of the opinion that this application cannot be heard by a single Justice because Civil Appeal No. 15 of 2018 is not an application for an interim order. It is an application for a final order of stay of execution. Counsel referred court to **Rule 50** of the Supreme Court Rules in respect of this objection. He concluded by praying that Court dismisses this application.

Submissions in response by counsel for the applicants on the preliminary points of objection.

The first preliminary point of objection raised was that this application was erroneously filed in this Court as it ought to have been filed in the Court of Appeal first. Counsel submitted that similar objections were raised previously in this Court in the following cases:-

Theodora Sekikubo and Ors vs The Attorney General and Another Constitutional Application No. 06 of 2013, Francis Drake Lubega vs The Attorney General Commissioner of Land Registration and Horizon Coaches Misc Application No. 13 of 2015, and also in the case of Hassan Basajabalaba vs. Attorney General, Misc. Application. No. 4 of 2018.

According to counsel, in all those cases court rejected the objections on the ground that when Rule \$6(2)(b)\$ and rule \$2(2)\$ of the Supreme Court rules are read together, they give this Court the discretion to entertain an application of this nature even if it was not first filed in the Court of Appeal. He argued that the first preliminary point of objection should be dismissed.

On the second preliminary point of objection counsel submitted that Rule \$13(1)\$ of the Mortgage Regulations 2012 is not applicable to the instant application.

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According to counsel, Regulation \$13(1)\$ of the Mortgage Regulations is applicable where the application is intended to stop or adjourn a sale of mortgaged property but in the instant application there was no effort to stop or adjourn a sale of mortgaged property. Counsel contended that the regulation

would be applicable if the bank had advertised a sale and the application was trying to stop or adjourn a sale.

Counsel submitted that the judgment under appeal to this court is not a judgment for the payment of any amount money and there is no order for 5 payment of any money not even in terms of costs. The Court of Appeal simply ordered the High Court to retry the case. Counsel contended further that only in circumstances where a judgment has ordered for payment of a sum of money and it is sought to have it stayed would a deposit for security of 30% be required. In this case the respondent has no actual award. Counsel prayed for the 10 objection to be struck out.

In respect of the third preliminary point of objection Counsel submitted that the applicants filed a substantive application for an injunction and for a stay of proceedings. The substantive application was Miscellaneous Application No. 30 of 2018 which is still pending and has not yet been fixed for hearing by a full bench. Counsel contended that this application was properly brought under rule \$6(2)(b)\$ and rule \$2(2)\$ of the Rules of this Court and a single Justice has the jurisdiction to hear and determine the application. Counsel relied on the case of Patrick Kaumba Wiltshire vs Ismail Dabule Civil Application No. 03 of

2018 to support his contention.

Counsel submitted that this honourable Court has the power to issue an interim order staying the execution of the Court of Appeal orders by invoking its powers under Rule \$6(2)(b)\$ and Rule \$2(2)\$ of the Rules of this Court.

Counsel concluded by praying that this objection be overruled and the matter be allowed to proceed on its merits because the objections that were raised were

not on points of law but were on issues that would require the parties to adduce evidence before court to enable the Court to make its ruling.

THE DECISION OF COURT

- Having had the opportunity to listen and to study the submissions of counsel for 5 both parties, I shall now proceed to consider and apply the law to counsels submissions in order to make a decision in resolution of the preliminary objections.
- For the first preliminary point of objection, the respondent's counsel solely 10 relied on Rule \$41(1)\$ (2) of the Rules of this court for his position that the application is not properly filed before this Court as it ought to have been filed in the Court of Appeal and this was not done thus contravening Rule \$41(1)(2)\$ of the Judicature (Supreme Court Rules) Directions [S.1.13-11].

This court sitting as a full court has had occasion to consider the same objection as was raised here by the respondents in **Constitutional Application No.04 of 2014 Hon. Theodre Sekikubo and 04 others versus The Attorney General and 4 others** and also in **Miscellaneous Application No. 04 of 2018. Hassan Basajjabala and another versus The Attorney General**.

In the later case this Court held:

"Rule \$2(2)\$ of the Rules of this Court provide as follows:

Nothing in these Rules shall be taken to limit or otherwise affect the inherent powers of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that the power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

Rules 41(1) & (2) read as follows:

Order of applications to Court and to the 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 sub rule \$(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 \$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.

Rule 6(2)(b) provide as follows:

- (2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-
- (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, an injunction or stay of proceedings as the **Court may consider Just.**

The above provision read together give this Court discretion to entertain an application that should have been made to the Court of Appeal at first instance. In *Hon. Theodore Ssekikubo & Others vs. Attorney General & Others* (supra), this Court stated as follows:

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'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.'

Also in the cases of *Yakobo M Sekungu and Ors vs Cresensio Mukasa* (Civil Application 5/2013) and *Guiliano Gargio vs Ca/audio Casadio* (Civil Application 3/2013), this Court stated that:

'The granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determine by the full Court as per the Rules.'

The Court went ahead to entertain the application. Applying the above quoted legal principles to this application I find that this is a matter over which this Court has the discretion to proceed with the application.

The defunct East African Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 691 considered circumstances in which preliminary points of objection should be raised and the Court held:

'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points of preliminary objection does nothing but unnecessary increase of costs and, on occasion, confuse the issues. This improper practice should stop.'

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On the authority of *Mukisa Biscuit Manufacturers Co. Ltd* (supra), this matter being one over which this Court has discretion should not have been raised by way of a preliminary point of objection. It is therefore hereby struck out on that ground.

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The second preliminary point of objection raised for the respondent was on the basis that the applicants were supposed to deposit as security of 30% of the forced sale value of the mortgaged property or the outstanding amount before the hearing of the application since the application had the objective of stopping the sale of mortgage property. Counsel submitted that it was a legal requirement under Rule 13(1) of the Mortgage Regulations for the security deposit to be made.

I find it appropriate to put down on record what the instant application is all about before proceeding to resolve the preliminary point of objection. The 15 Justices of the Court of Appeal by their Judgment of 3rd September 2018 set aside the ruling of the trial Judge in **Miscellaneous Application No. 99 of 2009**. They ordered that HCCS No. 300 of 2008 be reinstated on the cause list and that the said suit as well as **Miscellaneous Application No. 99 of 2009** to be tried **deno novo before** another Judge.

This is the decision the respondents were dissatisfied with thus the appeal to this Court. The applicants are by this application seeking for an interim order of stay of the execution of that Judgment pending the hearing of the main application for stay pending the hearing of the appeal. Does this application contravene **Rule 13(1) of the Mortgage Regulations 2012**.

Rule 13(1) of the Mortgage Regulations states:

"That the court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount." (the underlining is mine for emphasis)

Regulation 13(1) is in relation to adjournment of a sale of mortgaged property. What is in issue here is an application for an interim order of stay of a re-trial of 10 a case in the High Court. At this stage I do not find it possible to tell whether the re-trial would ever result into an order of a sale of mortgaged property or not. There is no reference to a sale of any property at this stage and I for that reason find **Rule 13(1)** of the Mortgage Regulations 2012 not applicable to this application. I therefore dismiss preliminary objection number two on that 15 ground.

Preliminary objection number three is on whether this court sitting as a single Justice has the Jurisdiction to hear and determine the instant application.

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When not satisfied with the decision of the Court of Appeal, the appellants filed a notice of appeal. They later filed the appeal which is Civil Appeal No.15 of 2018 pending in this Court. They subsequently filed a substantive application for stay of execution of the Court of Appeal decision which application is Civil

Application No. 30 of 2018 pending in this Court for hearing by a full bench. 25 The instant application is seeking for maintaining of the status quo pending the hearing and determination of Civil Application No. 30 of 2018, the main application for stay of execution. I have listened to counsel for both parties on this preliminary point of objection and carefully considered the points raised by

each counsel. I find that this Court has jurisdiction to entertain this application under Rules 2(2) and 6(2) of the Rules of this Court. I will not proceed to consider the merits of the applications itself as that may preempt the hearing and conclusion of the same.

For the reasons above stated I hereby dismiss the three preliminary points of objection and order for the application to be heard on its merits. The costs for this dismissal will abide the outcome of the application.

\$q\$ th of 12/10/10/19/19 Dated this day ... 10

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Hon. Justice Richard Buteera 15 JUSTICE OF THE SUPREME COURT.

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