

UGANDA / JUDGMENT

Uganda Electricity Distribution Company Limited v Okello and 41 Others (Civil Application No. 127 of 2021) [2022] UGCA 5 (20 January 2022)

[2022] UGCA 5

COURT

Court of Appeal of Uganda

BEFORE

Musota, JA

CASE / FILE NUMBER

Civil Application No. 127 of 2021

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 127 OF 2021

(Arising from Civil Application No. 126 of 2021) (Arising from Civil Suit No. 085 of 2004)

UGANDA ELECTRICITY DISTRIBUTION

COMPANY LIMITED ::::::::::::::::::::::::::::::

VERSUS

LEVY OKELLO & 41 ORS :::::::::::::::::::::::::::::: \$10\$

BEFORE: Hon. Justice Stephen Musota, JA

(Sitting as a single Justice)

RULING OF COURT

The applicants filed this application by Notice of Motion under Rules 15 \$2(2)\$, 43(1) and 44(1) of the Judicature Court of Appeal Rules.

The applicant seeks an interim order of stay of execution against the decree of the High Court in H. C. C. S No. 85 of 2004 pending the hearing and disposal of the substantive application for stay of execution and costs of this application.

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The grounds of this application are contained in the Notice of Motion and the accompanying affidavits of Esther N. Mulyagonja and Andrew Kabombo and are briefly that:

- 1. The applicant is dissatisfied with the judgment of the High Court in H. C. C. S No. 85 of 2004. The said judgment was delivered on 26th February, 2010 by the Hon. Justice Remmy K. Kasule, then Resident Judge, Gulu High Court Circuit.
- 2. On 26th May 2010, the applicant filed an application (vide Civil Application No. 103 of 2010) seeking an order for extension of time for filing a Notice of Appeal on the main ground that the said Judgment of the High Court was delivered without notice to the applicant. The said application was dismissed by the Assistant Registrar of the Court of Appeal on 25th October 2012.
- 3. The applicant being dissatisfied with the said Ruling of the Assistant Registrar filed a reference to a single Justice of the Court of Appeal (vide Civil Reference No. 146 of 2012). The said reference was also dismissed on 2nd April 2014.
- 4. The applicant was dissatisfied with the Ruling of the single Justice of Appeal and filed a further reference to the full bench of the Court of Appeal (vide Civil Reference No. 45 of 2014).
- 5. The Ruling of the Court of Appeal in Civil Reference No. 45 of 2014 dated 31st March 2021, was delivered by court without notice to the Applicant or counsel for the applicant.
- 6. In the said ruling in Civil Reference No. 45 of 2014, the Court of Appeal held, inter alia, that the trial Judge could not be faulted for his judicious approach to the exercise of his

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\$25\$

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discretion with regard to the award of interest and that there was no likelihood of success of the intended appeal.

- 7. The main ground for the said intended appeal was that the learned trial Judge erred in awarding interest retrospectively from 2003 on values in respect of the respondents' properties which had been valued pursuant to an order of court, ascertained and made up to date as of 2009.

- 8. Hon. Justice Remmy K. Kasule Ag. JA, who was the trial Judge in H. C. C. S No. 85 of 2004 was also among the three Justices of Appeal who heard and delivered the Ruling in Civil Reference No. 45 of 2014.
- 9. The Court of Appeal was not properly constituted as the Hon. Justice Remmy K. Kasule Ag. JA who was the trial Judge in H. C. CS No. 85 of 2004 ought not to have been part of the said coram. There was a miscarriage of justice to the detriment of the applicant.
- \$10.\$ The applicant has since filed an application for recall and setting aside of the said ruling in Civil Reference No. 45 of 2014.
- The said application has a high likelihood of success, and 11. the same will be rendered nugatory if this application is not granted.
- In the meantime, the applicant has filed a substantive \$12.\$ application for stay of execution.

Substantial loss will result to the applicant if this 13. application is not granted.

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\$14.\$ There is an eminent threat of execution as the respondents have previously demanded for payment of interest awarded in H. C. C. S No. 85 of 2004.

The respondent filed affidavits in reply deposed by Levy Okello, Eseru Okima Emanuel and Olulung Bosco. The deponents state that this \$\mathsf{S}\$ application is illegally before this court for reasons that there is no substantive application and no appeal filed in this court. That there is no eminent threat of execution as no bill of costs has been filed yet. The applicant filed an application for extension of time and the same was dismissed with costs vide Miscellaneous Application No. 10 103 of 2010.

The parties were directed, through the Registrar, to file written submissions, which they did.

Counsel submitted that the applicant filed a substantive application for stay of execution in this court vide Civil Application No. 126 of 15 2021 and the same is pending before this court. That there is a threat of execution as the respondent previously demanded for payment of the interest awarded in H. C. C. S No. 85 of 2004. Counsel argued that the applicant disputes the award of interest in H. C. C. S No. 85 of 2004 as having been awarded contrary to the principle of **restitutio** in 20 integrum.

That the applicant has an arguable case for setting aside the ruling in the said reference on ground that the reference was disposed of contrary to Article \$28(1)\$ of the Constitution as one of the justices was the trial Judge in the matter at the High Court.

Counsel submitted that the reference clearly has the names of the Justices of Appeal and Hon. Justice Remmy Kasule was part of the panel yet he heard the matter at the High Court. Counsel submitted that such errors in the Coram go to the root of the right to be heard under Article 28(1) of the Constitution.

In reply, the respondent's counsel submitted that this application is premature and the decree sought to be executed has not been extracted by this court. Further, that the substantive application for stay of execution has not been filed in this court and there is no pending appeal.

Counsel submitted that Civil Reference No. 045 of 2014 was heard before a full panel on 17th March 2017 before Hon. Justices Stephen Kavuma, DCJ (E), Justice Kenneth Kakuru, and Justice Elizabeth Musoke and the parties submitted orally in court and ruling reserved on notice. Subsequent to the retirement of Hon. Justice Steven Kavuma, DCJ (E), the reference was placed before another panel in 2020 prior to the lockdown. Ruling was reserved on notice and finally delivered on 06/04/2021.

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In addition, that the applicant's application for extension of time within which to file an appeal was dismissed with costs. The Notice of Appeal was struck off for being filed out of time without seeking leave of court.

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Consideration of the application

I have read and considered the pleadings and the submissions of both counsel. **Rule 6 (2) (b)** the Rules of this court which provides for stay of execution states:

(2) "Subject to sub rule (1) of this rule, the institution of an appeal $\$S$ 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 76 of these Rules, order a stay of *execution, an injunction or stay of proceedings on such terms* as the court may think just."

This is the rule which provides for stay of execution whether interim or substantive. However, there are different principles which the court must consider when considering an interim stay of execution.

In Hwan Sung Industries ltd vs Tajdin Hussein and 2 others Civil 15 Application No. 19 of 2008, Okello JSC (as he then was) stated some of the principals to be considered in granting interim orders of stay of execution, thus:

"For an application for an interim order of 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 pending *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."

The court, in addition to considering that a Notice of Appeal has been filed and there is a substantive application, has to consider whether $\$ \text{mathsf{S}} \$$ there are special circumstances warranting the granting of such an interim order. For such an application to be granted, there must be an eminent threat of execution.

In the instant case, the applicant filed a Notice of Appeal out of time and the same was struck off. The applicant filed a reference to a 10 single Justice of Appeal and the same was dismissed. The applicant further filed a reference to a full bench of this court vide Civil Reference No. 45 of 2014 and the same was dismissed by Hon. Justice Geoffrey Kiryabwire, Justice Monica Mugenyi and Justice Remmy Kakusle, Ag. JA. Owing to the above, it is clear that there is 15 no Notice of Appeal filed in this court as the same was struck off for being filed out of time.

I reiterate that for an application for an interim order of stay, the applicant has to have filed a Notice of Appeal and a substantive application for stay and that there is a serious threat of execution before the hearing of the pending substantive application. In the instant case, there is no appeal pending before this court. The applicant has therefore not fulfilled the conditions to warrant a grant of an interim order of stay of execution.

This application is therefore devoid of merit and the same is accordingly dismissed with costs.

Dated this 20th day of Jan $\$ \underline{\hspace{1.5cm}} 2022 \$$

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Stephen Musota JUSTICE OF APPEAL

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