THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC. APPLICATION NO.295 OF 2020
(ARISING OUT OF MISC. CAUSE NO. 242 OF 2019)

1. **MAKERERE UNIVERSITY BUSINESS SCHOOL (MUBS)**
2. **PROF. WASWA BALUNYWA ========== APPLICANTS**

VERSUS

DR. ISAAC WANZIGE MAGOOLA ========== RESPONDENT

BEFORE: HON MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under *Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Order 43 Rules 4(1), (2), (3) & (5) of the Civil Procedure Rules S.I 71-11* seeking orders that:

1. An order for the stay of execution and enforcement of the ruling in High Court Civil Division Miscellaneous Cause No. 242 of 2019; **Dr. Isaac Wanzige Magoola v Makerere University Business School & Anor**, be issued pending the hearing and determination of the appeal against the said ruling.
2. The costs of this application be provided for.

The application was supported by an affidavit deponed to by **Prof. Waswa Balunywa**, the 2nd Respondent and Principal of the 1st Respondent. The grounds of the application are briefly that:

a) The Applicants being dissatisfied with the ruling of Hon. Dr. Justice Bashaija K. Andrew delivered on the 29th May 2019, have filed a Notice of Appeal and requested for a typed certified copy of the proceedings and ruling.
b) The intended Appeal has very high chances of success as it raises substantive questions of law.
c) The Respondent has extracted a decree and served it on the 1st Applicant together with a letter to the Director Human Resource Directorate with claims that the Respondent is to report back to duty which poses a serious threat of enforcement of orders granted against the Applicants.
d) If the application is not granted, the intended appeal will be rendered nugatory and of no consequence; and substantial loss or great injustice will result to the Applicants.
e) The present application has been made without unreasonable delay following the delivery of the ruling on 29th My 2020.
f) It is in the interest of justice that this application is allowed.

The Respondent filed an affidavit in reply in which he opposed the application. He stated, inter alia, as follows:

a) The 1st Applicant had neither appealed nor authorized the 2nd Applicant to appeal on its behalf given that the decision to appeal and authorization are done by the management Committee Meeting (MCM) and approved by the School Council. Minutes of any such meetings do not exist.

b) It is clear that the 2nd Applicant, who was the 2nd Respondent in the main suit and the complainant in the disciplinary proceedings at MUBS, is unilaterally acting to use court process to wage a personal vendetta against the Respondent which is an abuse.

c) The Respondent was informed by his lawyers that the mere filling of a notice of appeal and letter requesting for certified record of proceedings in this Honorable Court is by law not a ground for consideration in exercising discretion to stay execution.

d) The Respondent was further informed by his lawyers that given the evidence on file, the appeal has minimal chances of success.

e) No decree had been extracted in the main suit and the mere filling of a bill of costs does not amount to commencement of execution proceedings.

f) The Applicants will suffer no loss whatsoever as the Respondent's presence adds value to the 1st Applicant and its students, junior academic staff and peers. Additionally, the Respondent's continued earning of half pay for no work done is a wastage of tax payers' money. To the contrary, the Respondent, his students, staff, co- researchers and writers globally will continue to lose due to the Respondent's isolation from academia if this application is granted.

g) The Respondent has further been informed by his said lawyers that the continued defiance of this Honorable Court's orders in the main suit is an exercise in contempt of court and entitles him to an action for a writ of mandamus.

h) The judgment and orders of this Honorable Court in the main suit are self-executory and, as such, cannot be subjected to execution proceedings in this Honorable Court thereby making this application a

mere wastage of court's time and brought mala fides to defeat the ends of justice.

i) It is only fair and just that this application is dismissed with costs.

Background

The brief facts leading to this application are that on the 06/08/2019 and 08/08/2019 respectively, the 2nd Applicant, also Principal of the 1st Applicant, suspended the Respondent from his offices as Dean of Faculty of Entrepreneurship and Business Administration and as a Senior Lecturer over a number of allegations. The Respondent was recommended to appear before the 1st Applicant's Appointments Board for disciplinary action. The Respondent challenged the action of the Applicants and filed a suit vide Miscellaneous Cause No. 242 against the Applicants contending that the decision to suspend him was ultra vires, illegal, procedurally improper and ought to be quashed. The matter was heard and decided in favour of the Respondent.

Dissatisfied with the ruling and orders of the trial Judge, the Applicants have filed a notice of appeal and applied for certified copies of the proceedings and the ruling so as to appeal to the Court of Appeal. By this application, the Applicants are seeking for orders of stay of execution and enforcement of the said ruling of the Court pending hearing and determination of the appeal.

Hearing and Submissions

Hearing of the application proceeded by way of written submissions.

Preliminary Point of Law

Counsel for the Applicants raised a preliminary point of law to the effect that the affidavit in reply deponed by the Respondent was incompetent for being neither commissioned by a Commissioner for Oaths nor dated as required by law. Counsel submitted that the affidavit was therefore incurably defective and ought to be expunged off the court record. Counsel relied on the case of ***In Re A Caveat HCMA 1248/1998*** and *Section 5 of the Commissioners for Oaths Act, Cap 5*.

In response, Counsel for the Respondent simply stated that it was their considered opinion that the Applicant's preliminary point of law regarding the propriety of the Respondent's affidavit in reply is misconceived in as far as the said affidavit as evident on the court record was sworn before a Commissioner for Oaths and is well within the law. Counsel for the Respondent, however, did not show to the Court the affidavit said to have been sworn before the Commissioner for Oaths. The affidavit in reply that is on the court record which was filed on 13th July 2020 is neither commissioned nor dated.

Section 5 of the Commissioners for Oaths Advocates Act Cap 5 provides –

> *Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.*

An affidavit is oath which must be administered in accordance with the law. According to the above provision, when an affidavit is taken before a Commissioner for Oaths, the Commissioner must authenticate the affidavit and indicate the place and date when the affidavit was taken. The effect of the

jurat or attestation referred to in the above provision is to confirm that the taking of the oath by way of affidavit has been authenticated by a duly authorised officer under the law, the Commissioner for Oaths. Under the law, the authentication has to be by way of affixture of the signature and official seal of the Commissioner for Oaths.

In the present case, the affidavit in reply on record bear neither a signature, a seal nor a date by a Commissioner for Oaths. In essence it is no oath and no affidavit. The defect is so incurable that no stretch of the principles of substantive justice can cure it. The purported affidavit is therefore struck off the record. Consequently, the application remains unopposed and it will be treated as such.

Merits of the application

It was submitted by Counsel for the Applicant that the law concerning stay of execution is to the effect that the court preserves or upholds the right of an applicant to be heard on their appeal on the merits. Counsel relied on the decision in ***Wilson Vs Church (1879) Vol. 12 Ch. D 454*** where it was held that:

> ***"As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the judgment appealed from as will prevent the appeal if successful from being rendered nugatory."***

Counsel for the Applicants submitted that in the instant case, the Applicants had filed a notice of appeal and had applied for a record of proceedings to enable the Applicants formulate the grounds of the appeal. Counsel further submitted that the Applicants had shown that the appeal has a high likelihood of success; that there was an imminent threat of execution; that they will suffer irreparable loss if the application is not granted; and the application had been brought without unreasonable delay. Counsel prayed that the Court grants the application.

Under the law, a judgment or decree of a court of competent jurisdiction takes effect immediately upon pronouncement and every court has an inherent power to proceed to enforce such judgment or decree. However, where there is need for an act of enforcement, otherwise called execution, the court may, when moved by a party, halt the execution process by way of an order of a stay of execution. Where the reason for the stay of execution is on account of an appeal to a higher court, it is the requirement of the law that the application is first filed in the court that passed the judgment or decree. In case of appeals form the High Court to the Court of Appeal, *Rule 42 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13 – 10* specifically provides that whenever an application may be made either in the Court or in the High Court, it shall be made first in the High Court.

Appeals from the High Court to the Court of Appeal are commenced by the lodgment of a notice of appeal with the Registrar of the High Court (*Rule 76 (1) of the Court of Appeal Rules*). The appellant would then be required to file a memorandum of appeal within 60 days from the date of lodging the notice of appeal (*Rule 83 (1) (a) of the Court of Appeal Rules*). Where the party who

desires to appeal has applied for a certified copy of the proceedings and decision of the trial court, the time taken for the preparation of the said record shall be taken into account when computing the time within which to file the memorandum of appeal (*Rule 83 (2) of the Court of Appeal Rules*).

It follows therefore that where a party has lodged a notice of appeal in accordance with the law, and has applied for a certified record of the trial court, and the record has not been provided; such a party is deemed to have filed an appeal to the Court of Appeal and has a right to apply for stay of execution of the judgment or decree of the High Court. If such a party satisfies the conditions for grant of an order of stay of execution, he/she would be entitled to the order.

To merit grant of an order for stay of execution pending appeal to the Court of Appeal, the Applicant must show that:

a) There is an imminent threat of execution;
b) The Applicant will suffer substantial loss if the application is not granted; and
c) The application had been brought without unreasonable delay.

Imminent threat of execution

On the issue of presence of an imminent threat of execution, it was shown in the affidavit in support of the application that the Respondent had extracted the Order, filed a bill of costs and served a letter to the Director of Human Resource of the 1st Applicant seeking to enforce the orders of the trial Judge and claiming to have reported for duty on 15th June 2020, among other reliefs granted in the Order of the Court. On perusal of the entire record before the

Court, I have noted that the Respondent has filed an application vide M.A No. 416 of 2020, the effect of which is to compel the Applicants to abide by the Orders of the trial Court. This, in my view, is sufficient evidence of an imminent threat of execution which, if not stayed, will have the effect of rendering the appeal nugatory as claimed by the Applicants.

Possibility of Substantial Loss

It was shown in the affidavit in support of the application that there was great danger of the Respondent and other persons that are subject to disciplinary proceedings before the 1st Applicant to take advantage of the impugned Orders to undermine the operations of the 1st Applicant. The deponent further stated that the said Orders, if enforced, would substantially undermine the organs of the 1st Applicant and thus affect its autonomy since the Respondent had also opted to pursue internal remedies and various decisions had already been taken. The deponent stated that the 1st Applicant was likely to suffer substantial loss if this application was not granted.

Once it has been shown by the Applicants that they are dissatisfied with the decision of the trial Judge and have preferred an appeal, the Applicants are entitled to have their challenge of the Court's Orders heard and determined before the same Orders can take effect. Allowing the Orders challenged to be enforced would, no doubt, occasion harm to the 1st Applicant and its organs. I agree with the claim by the Applicants that such harm would be substantial in nature.

Timeliness of bringing the Application

It was shown by the Applicants in the affidavit in support of the application that the ruling having been delivered on 29th May 2020, the Applicants made this application without unreasonable delay. According to the record, this application was filed on 24th June 2020, about 25 days after delivery of the ruling in issue. I am satisfied that the Applicants are not guilty of unreasonable delay.

Decision of the Court

In all therefore, the Applicants have satisfied all the essential conditions for grant of an order of stay of execution of the Orders of the Court pending the hearing and determination of the appeal in the Court of Appeal. The application is therefore allowed with the following orders:

1. An order for stay of execution and enforcement of the Ruling and Orders in High Court Civil Division Miscellaneous Cause No. 242 of 2019 is issued pending the hearing and determination of the appeal against the said Ruling and Orders.
2. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered by email on this 8th day of October, 2020.

Boniface Wamala

JUDGE