

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA, AT KAMPALA
CIVIL APPLICATION NO. 03 OF 2011
[Arising from Civil Application No.2 of 2011]

BETWEEN
AKRIGHT PROJECTS LIMITED:.....APPLICANT
Versus

EXECUTIVE PROPERTY HOLDINGS
LIMITED & 12 OTHERS
.....RESPONDENTS

RULING OF DR. E. KISAAKYE, JSC

The applicant, Akright Projects Limited filed this application against the respondents, Executive Property Holdings Limited and 12 others. This application was brought under rules 2(2), 6(1) (b), 41(2) and 42(1) of the Judicature (Supreme Court) Rules and is based on 15 grounds which are set out in the Notice of Motion.

The applicant is seeking for the following orders that:

- “1. ***This Honourable Court do issue and Order of Interim Stay of Execution restraining the Respondents, their agents or servants from selling and or transferring the properties comprised in Block 276 Plots: 376, 381,382, 403,409,410,411,412,415,417,418,419,420,421,422, 423, 446, 508, 512, 513, 515, 522, 524, 525, 526, 528, 531, 532, 533, 534, 535, 536, 537, 540, 542, 543, 544, 547, 548, 550, 551, 552, 553, 666, 667, 668, 671, 673, 676, 475, 474, 473,472, 468, 467, 466, 457, 456, 454, 453, 452, 451, 450, 448, 447, 366, 367, 368, 370, 374, 375, 554, 555, 556, 558, 559, 560, 478, 479, 483, 485,486, 487, 488,490, 494, 495, 496,497, 501, 506,508, 512,***

507, 383, 385, 386, 387, 388, 389, 390, 391, 392, 394, 395, 397, 398, 400, and 401 till the Main Application is heard and disposed off.

2. An Order of Interim Stay restraining the Commissioner Land Registration his/her agents and or servants from transferring to any third parties all the disputed land as it existed on the 6th January 2010. [The Order of the Court of Appeal dated the 23rd January 2010 refers]."

The following brief background is necessary before considering the merits of this application. The applicant filed Application No. HCT-OO-CC-MA 192 of 2009 in the Commercial Division of the High Court, seeking for leave to appeal the Orders made on 11th March 2009 in High Court Miscellaneous Application No. 33 of

2009. Apparently, while this application was still pending, the applicant filed Civil Appeal No. 31 of 2009, in the Court of Appeal on 7th May 2009, without first obtaining leave to appeal.

On 18th May 2009, Justice Choudry dismissed the applicant's Miscellaneous Application No. 192 of 2009 for leave to appeal, with costs to the respondents. On the May 21st 2009, the applicant filed Miscellaneous Application No. 64 of 2009 in the Court of Appeal. In this application, the applicant sought leave to appeal to be granted with respect to their Civil Appeal No. 31 of 2009.

The Court of Appeal fixed Civil Appeal No. 31 of 2009 for hearing on 7th **February 2011. At the hearing, counsel for the respondents raised a preliminary objection on a point of law. He argued that the said appeal should be struck out** on grounds that the order the applicant was seeking to appeal was not appealable as of right and that the applicant had not obtained leave of court before it lodged its appeal.

The Court of Appeal observed in its Ruling that the Applicant had filed Application No. - 64 of 2009 which was seeking for leave to appeal in time on the 21st May 2009 and that it

was awaiting the court's disposal. It however struck out

Civil Appeal No. 31 of 2009 on grounds that this Appeal could not be pending before the Court, before leave to appeal had been obtained.

Being dissatisfied with this Order, the Applicant filed a Notice of Appeal in the Court of Appeal on 8th February 2011. The Applicant also filed Civil Application No.2 of 20 11 in this Court on 29th March 2011, seeking orders for a Stay of Execution. On the same day, the applicant also filed this application (Civil Application No.3 of 20 11) seeking for an Order of Interim Stay of Execution until Civil Application No.2 of 20 11 is heard and disposed of.

The application for Interim Stay of Execution is based on 15 grounds set out in the Notice of Motion as follows:

- “(1) The applicant filed Civil Appeal No. 31/2009 at the Court of Appeal on the 1st May 2009, pending leave to normalize it vide Civil Application No. 64/2009 which was pending in the Court of Appeal.***
- 2) On the 28th January 2011, the court served Hearing Notices for Civil Appeal No. 31/2009 to be heard on the 1st February 2011 at 9.30 a.m., and the Registrar inadvertently forgot that there was a pending application for leave to appeal at the Court which had not been disposed off.***
- 3) -On the 28th January 2011, Counsel for the Applicant wrote a letter to the Registrar Court of Appeal drawing his attention to the pending application which needed to be disposed off before the main appeal can be heard.***
- 4) In the said letter it was proposed that if court could find it convenient to fix the application the same date of the appeal so that it could be disposed off before the Appeal.***
- 5) Counsel for the Applicant made a follow up to the letter on the 31st January 2010 with the Registrar who informed him that the pending application could not be fixed on the same date of the appeal however advised Counsel to address their Lords on the matter before the hearing of the scheduled appeal.***
- 6) On the 1st February 2011, before Counsel for the Applicant could address***

court, Counsel for the Respondents raised a preliminary point of law on

the competence of the appeal without first obtaining leave, hence prayed to Court to strike off the Appeal.

- 7) Counsel for the Applicant in reply addressed court to the effect that he was neither not ready to proceed with the Appeal as there was Civil Application No. 64/2009 pending for leave which would normalize the Appeal and prayed to court to adjourn to enable him fix the said application before the Appeal is heard .*
- 8) Court struck off the Appeal by reason that there was no appeal to adjourn without hearing the application for leave on its merits nor did it hear on merit the application to strike off the Notice of Appeal on its merit.*
- 9) Court ought to have stayed the application to strike out the Notice of Appeal in order to pave the way for the other application to be heard but their Lordships omitted to do so.*
- 10) The application for leave was completely before court because it was filed within the stipulated requisite time of 14 days.*
- 11) The striking out of the appeal rendered the order issued by the Court of Appeal on the 23^N/ February 2010 to the Commissioner Land Registration his/her agents and servants to preserve the status quo of over 110 properties nugatory and put the Applicant in great danger as of now the properties may be transferred to any third party before the disputes surrounding them is resolved.*
- 12) The applicant has already filed a Notice of Appeal at the Court of Appeal and at the same time filed main application No. 02/2011 for a stay of execution in this Honourable Court.*
- 13) The applicant's main application is likely to be prejudiced and rendered nugatory if this court is not pleased to issue an Interim Order of Stay restraining the Respondents, their agents and or servants from selling and or transferring the properties in dispute to any third party AND a similar order to the Commissioner Land Registration, his/her agents or servants not to transfer any of the properties to a third party before the main application is heard and disposed off.*
- 14) The Applicant is going to experience immense loss and eventually get involved in multiple suits against it seeking for specific performance from a number of customers who had already made advance payment to the properties in dispute.*

15) *that it is just and equitable that this honourable Court be pleased to issue an Order of Interim Stay restraining the Respondents, their agents and or servants from selling and/or transferring all properties ad listed items 1 of this application to any third party AND FURTHER, issue a similar order from transferring all the propertied to any other third party till the main application is heard and disposed off."*

The application is also supported by an affidavit sworn by Dr. Anatoli Kamugisha and a second affidavit in rejoinder sworn by one Robert Irumba.

At the hearing of this application, the applicants were presented by Mr. Kituuma Magala of M/s Kituuma & Company Advocates while the respondents were represented by Hon. Niwagaba of M/s Niwagaba & Mwebesa Advocates. Both counsels made oral submissions.

Counsel for the applicant submitted that the Court of Appeal erred in law when it

_____ struck out his client's civil appeal No. 31 of 2009, on a preliminary objection raised by counsel for the respondents. He argued that the ground the learned Justices of Appeal relied on that the applicant had not obtained leave to appeal was not valid because the same learned Justices of Appeal acknowledged in their 11.11.11 ruling that an application for leave to appeal was pending and competently before the court. He relied on the 15 grounds on which the application is based which I reproduced earlier in this ruling and the supporting Affidavits of Dr. A. Kamugisha and Robert Irumba.

Counsel for the applicant reiterated the rules under which this application was brought and the two Orders of Interim Stay of Execution that his client was seeking for. Counsel contended that it is established law that before this Court can grant an Interim Order of Stay, it must satisfy itself that a Notice of Appeal had been filed in accordance with rule 72 of the Supreme Court Rules; that there is a substantive main application already filed in this court and that there is a threat that

execution will ensure which will prejudice the substantive main application and make it nugatory. He contended that the applicant had already satisfied these requirements by filing a Notice of Appeal, (Annexure D) and also a substantive Civil Application (No.2 of 2011).

He further contended that the main thrust of the present application was to preserve main application and not to make the substantive application nugatory. He relied on ***Kitende v. Mr. Wismer, Civil Application No.6 of 2010 (Supreme Court) (unreported)*** in support of contention.

In response to the respondents' affidavit in reply, counsel submitted that all issues had been responded to in the affidavit in rejoinder in paragraphs 3,4,5,6,7,8,9 and 10. He further submitted that it was not true that the properties listed in Prayer No. 1 of the application had been transferred as alleged in the Affidavit in reply.

He prayed that the court issues the order of interim stay of execution until the main application is heard and disposed off since the application has passed the set tests of this court and since this Court has inherent power to grant the order under rule 2(2) of the Supreme Court Rules. He also prayed that the costs abide the outcome of the main application.

Counsel for the respondent opposed this application. He contended, with respect to the applicant's prayer No.2 that the applicant was seeking an order

that is retrospective in nature, and yet according to paragraph 8 of the Affidavit in reply, it showed that the properties in question had already been transferred. He further contended that such a retrospective order would have far reaching consequences for his clients.

Secondly, counsel for the respondent submitted that it is trite law that for an application of this nature to succeed, both the substantive application and the main appeal must have high chances of success and it must be pleaded so. He contended that this was not done in the applicant's pleadings. On the contrary, he contended that the totality of the facts on the record as reflected in the respondent's affidavit in reply read together with paragraph 4 of the applicant's Affidavit in Rejoinder, showed, among other things, that at the time the alleged appeal was struck out on the 11th February 2011, no such leave had been obtained by the applicant.

He submitted that the totality of the above facts showed that the applicant had no chances at all to succeed in both the substantive application and the intended appeal, since no right of appeal lies as of right in favour of the applicant in this case. He relied on section 76 (2) of the Civil Procedure Act which prohibits an appeal against an appeal in respect of an order, and Rule 40(2) (b) of the Court of Appeal Rules which make the decision of the Court of Appeal refusing to grant leave final and un appealable. He submitted that in dismissing the alleged appeal, the learned Justices of Appeal were aware of the application which was pending before it; that is Miscellaneous Application No. 49 of 2009 to strike out the Notice of Appeal and Miscellaneous Application No. 64 of 2009 seeking leave to appeal. He argued that the learned Justices had however used their discretion when they refused to grant the applicant leave to appeal and instead chose to strike out the applicant's appeal.

He submitted that the applicant should have applied for leave first before filing the Notice of Appeal in this court as provided for under rule 39 (2) of the Supreme Court Rules. However the time for filing this application expired long before he filed the Notice of Appeal. He contended that granting this application would be a waste of

Court's time.

On counsel for the applicant's submission regarding a threat of execution, counsel for the respondent submitted, relying on paragraph 8 of the affidavit in reply, that the execution was long completed and that was why the evidence of threat of execution was not provided to the court. He contended that the only execution would be with respect to the costs, but again, there was no evidence that the respondent's costs had already been taxed or that there is an application to execute in respect of those costs.

He concluded by submitting that the application was incurably defective and redundant as it served no purpose to preserve the status quo. He prayed that the application be dismissed with costs.

In his reply to the respondent's submissions, counsel for the applicant contended this application was competently before' court. With respect to the respondent's submissions on rule 39 of the Supreme Court rules, applicant's counsel contended that they had informally told the Court of Appeal that they were going to appeal and that this is what rule 39(a) requires. On the submissions contending that the Interim order if granted would have a retrospective effect, he contended that it was not true that the Order would be retrospective, since their pleading was that the order should be with effect from 23rd February 2010. Counsel for the applicant argued that he had annexed to the application the expired Order which had been issued by Justice Twinomujuni when the properties are the same as those listed in Prayer 1 of the application.

He urged this Court to disregard the respondent's prayer that the applicant should show that there is a high likelihood of success in the main application. He contended that the learned Justices of the Court of Appeal never considered the merits of Miscellaneous Application No. 64 of 2009.

On the submissions with respect to rule 40 (2) (b) of the Court of Appeal Rules, he submitted that the applicant had complied with the requirements of this rule because it filed its application in the Court of Appeal on 21/5/2009 and yet the application for leave to appeal by the Commercial Court was dismissed was on 18/5/2009. He submitted that this was also evidenced in the judgment of the Court of Appeal and in paragraph 3 of the Affidavit in Rejoinder.

Counsel also submitted, in response to the respondent's contention that execution had been completed, that there was no proof that execution had been effected. He urged court to ignore paragraph 10 of the Affidavit in Rejoinder.

Lastly, on the issue of transfers having already been effected, he submitted that this was not true because the respondent did not file any Affidavit sworn by the said

Robert Nyombi, the Registrar of Titles to that effect or put any other evidence on record to support its claim. He reiterated his prayer to court to grant the orders the applicant was seeking.

Let me now turn to consider the law as earlier, this application was brought, among others, under Rules 6(2) (b) of the Judicature (Supreme Court) Rules. The relevant part of this Rule 6(2) (b) provides as follows:

“... 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.”

Furthermore, this application is also brought under rule 2(2) of the Judicature (Supreme Court) Rules. This rule reaffirms the inherent power of this court to make "such orders as may be necessary for achieving the ends of justice "The question before this court is whether the present application falls within the ambit of cases where this court can exercise its powers either under rule 6(2) (b) or rule 2(2) of the Supreme Court rules or both.

The Notice of Appeal that the applicant filed in the Court of Appeal is respect of the ruling the Court of Appeal made in Civil Appeal No. 31 of 2009. This ruling struck out CIVIL Appeal No. 31 of 2009 because the necessary leave to appeal had not been obtained prior to its filing and purported hearing. The application before me (Civil Application No.3 of 2011) seeks an interim order of the stay with respect to many properties which have already been a subject of litigation before the High Court Commercial Division. The applicant attached to its application the Interim Order which was issued by Justice of Twinomujuni, JA, the relevant part of which provided thus:

“I. That an Interim Order be issued to the Commissioner Land Registration to preserve the status quo on the Land Registers in respect of all disputed Plots as it existed on the 6th January 2010 ...”

The applicant, in its wisdom chose not to put the Court Order from the Trial Court which substantively dealt with the disputed plots of land on the record. Having this Order on record would have provided this court with the necessary background for the proper disposal of this application. The applicant has failed to establish the connection between the subject matter of the Notice of Appeal which the applicant filed, with respect to the ruling of the Court of Appeal dismissing the applicant's appeal, and the subject matter of the present application or Civil Application No.2 of 2011, which

seeks for orders for Interim Stay to restrain the respondents from selling and/or transferring the named plots comprised in Block 276 and restraining the Commissioner Land Registration and his/her agents from transferring any of

the disputed plots to any third party until the main application has been disposed off.

The applicant's second prayer seeks an interim order to restrain the Commissioner Land Registration, his agents and/or servants from transferring to any third party all the disputed land as it existed on the 6th January 2010. The applicants referred this court to the Order of the Court of Appeal dated 23rd January 2010, which I have already referred to. The reasons I have given in denying to grant the applicant's first prayer are sufficient to support the denial of this order as well.

Furthermore, counsel for the respondent objected to the granting of this order on several grounds which included the fact that the order if issued, would have a retrospective effect and secondly that the property had already been transferred. The applicant disputed the submissions of counsel for the respondent and in turn argued that the respondent should have provided evidence to support their claims. With due respect, I am not convinced by the arguments of counsel for the applicant. It was incumbent on the applicant and not the respondent to adduce documentary evidence in the form of certified copies of the duplicate certificates of title and/or copies of the search results with respect to the current ownership of each of the disputed plots of land. Such evidence would be vital to enable court to consider the merits of this application. The applicant has failed to discharge its burden of proof as the applicant in this matter and instead is asking this court to make orders where it has not shown that it has any interest or which may belong to third parties who are not party to these proceedings and who may therefore suffer injustice without being given an opportunity to be heard. Besides, it is not clear why the applicant would need this order from court when it could safeguard its interest by lodging caveats on the disputed plots instead.

In the circumstances, the applicant has failed to convince me that this is a deserving case for me to grant an interim order of stay of execution either under rule 6(2) (b) or where I can grant the orders sought basing on the inherent jurisdiction of this court which is provided for under rule 2(2) of the rules of this court.

I have found no merit in this application and I accordingly dismiss it with costs to the respondents.

Dated at Kampala this 25th day of January 2012.

Hon. Justice Dr. Esther Kisaakye
Justice of the Supreme Court