IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Johnston Busingye, PJ, John Mkwawa, J, Isaac Lenaola, J.)

APPLICATION NO. 1 OF 2013

(ARISING FROM APPLICATION NO. 12 OF 2012)

(ARISING OUT OF REFERENCE NO. 2 OF 2012)

THE ATTORNEY GENERAL
OF THE REPUBLIC OF UGANDA ……APPLICANT

VERSUS

1. **THE EAST AFRICAN LAW SOCIETY ……1st RESPONDENT**
2. **THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY ……2nd RESPONDENT**

DATE: 17TH MAY, 2013

RULING

Introduction

1. The Attorney General of the Republic of Uganda (hereinafter " **the Applicant''**) brought this Notice of Motion dated 14th March 2013 under the provisions of Rules 54 (2), 110 (1), (2) and (3) of the Rules of Procedure of this Court and save for the prayers on costs, the only substantive order sought is the following:

"An order doth issue to stay execution of the ruling and orders in application No. 12 of 2012 given on 13th February 2013 pending the determination of the Appeal."

Background

1. The Applicant was the Respondent in **Reference No. 2 of 2012** from which arose **Application No. 12 of 2012** which was filed by the instant 1st Respondent, namely the East African Law Society. The Applicant is aggrieved by the Ruling of this Court delivered on *13th February 2013* in the aforesaid Application **(No. 12 of 2012)** and now intends to go on appeal against that ruling and orders given in favour of the 1st Respondent. It is on the basis of the foregoing that he now seeks for an order that will have the execution of the ruling and orders of this Court given on 13th February 2013 ,stayed pending the determination of the intended appeal before the Appellate Division of this Court. It may not be out of place to mention that he has filed a

Notice of Appeal and that in addition, the Applicant has requested for proceedings in **Application No. 12 of 2012** to enable him to file the Record of Appeal.

2. A brief recount of what transpired is a necessary preface to this Application. In **Application No. 12 of 2012,** the instant 1st Respondent, if we may put it in a nutshell, craved for this Court's leave to produce additional evidence in form of documentation and electronic format after the close of pleadings in **Reference No. 2 of 2012**.

3. It is common ground that at the Scheduling Conference, parties had consented that all evidence would be tendered by way of Affidavits. But subsequent to the Scheduling Conference, the 1st Respondent obtained evidence which they allege could not be easily obtained to be used at the Reference as it necessitated **"surmounting of diplomatic hurdle and corporate red-tape**".

4. It was against that background that they brought a Notice of Motion dated 2nd September, 2012 under the provisions of Rule 46 (1) of the Rules of this Court seeking for the following substantive order: **"That this Honourable Court be pleased to grant leave to the Applicant to produce additional evidence in form of documentation and electronic format after the close of pleadings**."

5. It is again common ground between the parties that this Court allowed the application and had this to say:

"In a nutshell, it is our view that the import of Rule 46(1) is to ensure that no evidence is shut out even after pleadings have closed and to enable the Court exercise discretion whenever necessary to do so and to afford an opposing party adequate opportunity to comment on and rebut the new evidence tendered by the other party and if necessary, file fresh evidence to contradict it."

In conclusion, we find no credible reason to deny the Motion and will now allow it in the following terms:

(i) The Applicant, the East African Law Society, shall be granted leave to produce additional evidence in Reference No. 2 of 2012 pending before this Court for determination.

(ii) The evidence to be produced shall be in the form of documentation and also in electronic format.

(iii) The additional evidence shall be served upon the Respondents within 21 days of this Ruling.

(iv) The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence.

(v) Parties will thereafter appear for directions on how to proceed with the matter.

(vi) Costs of the Motion will abide the determination of Reference No. 2 of 2012.

Orders accordingly."

7. It is the above orders that triggered the Instant Application.

Grounds of the Application

8. The instant Application is based on the following grounds, contained in the affidavit of Mr. Cheborion Barishaki, the Director Civil Litigation, sworn on 7th March 2013 on behalf of the Applicant. Briefly stated they are:

i. That the Applicant lodged a Notice of Appeal against the whole Ruling in **Application No. 12 of 2012** and accordingly requested for the record of proceedings to enable him file a record of appeal.

ii. That substantial loss will result to the Applicant unless the order is made.

iii. That the intended appeal has high chances of success.

iv. That if this Court does not grant a stay of execution of the orders in **Application No. 12 of 2012**, it will render the intended appeal nugatory.

v. That if this Court does not grant a stay of executive the orders in this **Application No. 12 of 2012**, the Applicant shall suffer extreme prejudice in as far as all prior proceedings including conferencing and submissions shall be rendered nugatory and would likely result in a mistrial.

vi. That this Application has been brought without any unreasonable delay.

vii. That it is just and equitable in the circumstances that this Court orders for a stay of execution of the orders issued in **Application No. 12 of 2012** pending hearing and final determination of the intended Appeal to the Appellant Division.

9. The 2nd Respondent filed no response to the Application while the 1st Respondent elected to proceed under Rule 41 of the Court's Rules of Procedure and filed no Affidavit, but relied on preliminary points of objection filed on 3rd May 2013. The preliminary points of objection are the following:

(i) That the application is an abuse of the process of the Court in so far as the same has been overtaken by events, i.e. that the application seeks to stay the execution of orders of this Court issued and/or given on 13th February, 2013 which are spent and not available for challenge in any way.

(ii) The Application as drawn and crafted does not relate to a decree; only a decree is capable of execution while an order is capable of compliance, obedience, observance and being abided by.

(iii) The Application is devoid of merit, lacks foundation and is fatally defective in as much as it is misconceived.

It is the Respondent's argument, in a nutshell, that the order should not be granted.

Submissions

10. Mr. Mwaka, Principal State Attorney, who appeared for the Applicant, in his submissions, told the Court that when it comes to an application for stay of execution the law provides for a number of conditions to be met. The conditions are:

11. One, that an Appeal must have been filed. He, however, admitted that there has been debate as to when an appeal is effectively filed and one contention is that an Appeal is effectively filed when the memorandum of appeal is filed. But, that there are also judicial authorities which say that mere filing of a Notice of Appeal is sufficient and he preferred the latter argument. In support of this contention he referred us to a decision of the High Court of Uganda at Kampala, namely, **Application No. 178 of 2005 Sewankambo Dickson Vs**

Ziwa Abby [EA] 227 which quoted with approval a decision of the defunct East African Court of Appeal, namely **Ujgar Singh Vs Rwanda Coffee Estates Ltd. [1966] E. A 263** where Sir Clement De Lestang, Ag. V. P. stated *inter- alia* that **"…It is only fair that an intended Appellant who has filed a notice of appeal should be able to apply for a stay of execution to the Court …as soon as possible and not have to wait until he has lodged his appeal to do so."**

12. It was further submitted by Mr. Mwaka, that over the years, Courts have established three conditions for determination of applications for stay of execution:-

(a) That substantial loss may result to the Applicant unless the order of stay is made;

(b) That the application has been made without unreasonable delay; and

(c) That security for costs has been given by the Applicant.

13. Mr. Mwaka avers that substantial loss may result if the execution of the impugned orders of this Court are executed in that the 1st Respondent (then the Applicant) was in effect allowed to produce open-ended evidence which traverses Masaka, Lira and Jinja areas instead of the original incidents around the city of Kampala. It is his submission therefore that, since the new incidents are over one hundred (100) this is more or less twenty (20) times more than the original evidence which was filed. He further contended that if the new affidavit were allowed, it will have the effect of introducing evidence

which would absolutely change the nature and character of the whole Reference to the prejudice and suffering of the Applicant. He then referred us to the recent decision of the Supreme Court of Kenya in **Petition No. 5 of 2013 – Raila Odinga v The Independent Electoral and Boundaries Commission and 3 Others as consolidated with Petitions No. 3 and 4 of 2013** where the Court rejected filing of further affidavits for a number of reasons including the Constitutional limitation of time within which to determine the Petition. In that case, Mr. Mwaka contended that the further affidavit was rejected at Conferencing whereas in this case, Conferencing had already been done, pleadings were closed and even submissions had been completed before the new evidence was introduced.

14. Mr. Mwaka's next line of attack was that if the instant application is not granted, the appeal that he intends to pursue with the Appellate Division of this Court will be rendered nugatory. It is also his argument that the fifth (5th) order given in the impugned Ruling is to the effect that parties will appear for directions on how to proceed with the matter.

15. He contended that it is his understanding that the appearance for directions on how to proceed with this matter would be similar to conferencing and it is his argument that re-conferencing the matter will require them to file new submissions or additional submissions in view of the new evidence tendered by the 1st Respondent. So, at this stage, if the order of stay of execution is not granted, the Applicant will find himself even more prejudiced than he

already is, by *inter- alia*, lack of time and the fact that the re-conferencing would likely lead to a mistrial because of the change of the nature and character of the Reference.

16. It is his stance, therefore, that it is only equitable that parties be allowed to await the outcome of the decision of the Appellate Division of this Court.

17. On the requirement for security for costs, it is his submission that pursuant to the loud and clear provisions of Rule 115 (2) of the Court's Rules of Procedure, the Applicant is absolved from the requirement for costs. The aforesaid Rule states as follows:

> **"(2). Provided that where a claimant is a Partner State, the Secretary General, or any of the institutions of the Community no security for costs shall be required"** (the emphasis is supplied).

18. It is Counsel's contention therefore that the Applicant, being a party to the Treaty, cannot be condemned to deposit security for costs as whatever funds that will come by way of security for costs would come from the Consolidated Fund of Uganda and Uganda being a sovereign State cannot be treated the same way as a Corporation and there is, therefore, no need to deposit security for costs in Court.

19. Mr. Mwaka concluded his submission by saying that the Applicant by going on appeal is seeking from the Appellate Court specific guidance, inter alia, on the following:

(a) At what stage of the proceedings in Court can new evidence be allowed
(b) On what grounds? and
(c) How urgent should the grounds be to allow the new evidence to be presented?

For the above reasons Mr.Mwaka argues that this is a fit and proper case for grant of the orders of stay as prayed.

20. In rebuttal, Mr. Mtuy who represented the 1st Respondent in this Application told the Court that he was resisting the Application and in support of his stance he reiterated the points he had raised in the Preliminary points of objection which are reproduced elsewhere above and we need not re-state them.

21. Apart from the foregoing, Learned Counsel submitted that as indicated earlier on, the 1st Respondent encountered a lot of hardship in getting the required evidence in support of their Claim, particularly the video evidence due to the political tension and insecurity prevailing in Uganda at that time.

22. It is his stance that the new evidence which was in the nature of electronic print was not only necessary but relevant to enable this Court make a fair and unbiased decision and to meet the ends of justice.

23. Counsel's counter-argument in respect of Mwaka's fear of a re-conference was brief and clear. He submitted that the Ruling of the Court on 13th January 2013 had made it amply clear that:

> **"The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence''** (see (iv) at pg.7 of the Ruling in question).

24. It is Mr. Mtuy's argument in that regard that the Applicant is in no way prejudiced as he has ample time to file any evidence in rebuttal to the new evidence tendered by the 1st Respondent.

For the above reasons he prayed that the Application be struck out with costs.

Determination of the Application

25. We have carefully addressed our minds to the arguments by both Counsel appearing and we opine as follows:

26. One, that we note that the Applicant herein has only lodged the notice of appeal and not the record of appeal although he has applied for the said record.

27. We are alive to the fact that like Bamwine J stated **in Sewakambo**(supra) authorities appear inconsistent on this area of Law, some stating that the lodgment of a notice of appeal is an intention to appeal and cannot amount to the actual appeal that must be lodged by filing a memo of appeal, record of appeal, payment of fees and security for costs (see **G. N. Combined (U) Ltd – vs.- A. K. Detergents (U) Ltd H.C.C.C No. 384 of 1994** reproduced in**[1995] iv KARL 92**)

28. On our part, we fully agree with the reasoning in **Ujagar Singh** (Supra) and the **Sewankambo** case (supra) and we respectfully associate ourselves with the position that a notice of appeal is a sufficient expression of an intention to file an appeal as rightfully submitted to us by Mr. Mwaka and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

29. Two, having so found and held, we will now consider whether the instant Application meets the requirements for orders of stay of execution as prayed namely;

(a) That substantial loss may result to the applicant unless the order of stay is made;

(b) That the application has been made without unreasonable delay; and

(c) That security for costs has been given by the Applicant.

30. On the first requirement, Mr.Mwaka's main argument was that the impugned Ruling, in essence, added new causes of action to the Reference at the close of the case and long after submissions had been filed and the only action remaining to be undertaken before judgment was the highlighting of those submissions. The effect was that the Applicant was greatly prejudiced and was ambushed by the new evidence tendered by the 1st Respondent. That therefore, he was unable to effectively respond to the new issues raised as the character and nature of the Reference as initially filed had completely changed.

31. Mr. Mwaka , therefore ,contended that the orders sought would have the effect of maintaining the *status quo* to enable the Applicant seek from the Appellate Division of this Court, guidance on what he described as **"the fundamental issues, as to what stage in the course of proceedings can new evidence be adduced and on what grounds."**

That failure to grant the orders of stay would render the appeal preferred by the Applicant nugatory and he will thereby suffer substantial loss.

32. Mr. Mwaka's arguments on this limb were not, in our considered view, seriously and meaningfully assailed by Mr. Mtuy. The latter, as we have shown much earlier in this Ruling, filed Preliminary points of Objection on three Points of Law but in fact all were issues of fact that were not vindicated by way of evidence in an affidavit as the law and practice would demand. With respect to the Learned counsel, we find no substance in the points raised by Mr. Mtuy, and so we propose to dispose of them only very briefly by saying that they are misconceived and incompetent, in that in the impugned Ruling (the subject matter of the instant Application), we gave seven orders and to-date only one of them has been complied with. It cannot, therefore, be said that the "**instant Application is an abuse of the Court process in that the impugned orders have been fully complied with or that what the Applicant seek to stay is spent and not available for challenge in any way."**

33. In view of all the foregoing, we are of the firm view that the Applicant has satisfied the first requirement because this Court is alive to the fact that if it continues with the hearing of Reference No.2 of 2012,the intended appeal will be rendered nugatory and the Applicant will be prejudiced and suffer loss if that appeal were to succeed.

34. As regards the second requirement, namely, that the Application has been made without unreasonable delay, we opine as follows:

35. The impugned Ruling was delivered on 13th February 2013 and the Applicant lodged a Notice of Appeal on 4th March and accordingly on the same day requested for the records of proceedings to enable him file a record of appeal. Happily, he was not challenged on this. It cannot, therefore, by any stretch of imagination be said that there was a delay on the part of the Applicant. It does appear to us that the Application was made without unreasonable delay.

36. We, accordingly, find and hold that the second requirement is also in the Applicant's favour.

37. This leaves only the third requirement, namely, payment of security for costs. The Applicant in the instant Application is the Attorney General of the Republic of Uganda. Mr. Mwaka has urged us to invoke the provisions of Rule 115 (2) of the Court's Rules of Procedure to exempt him from the requirement of security of costs.

38. We need not labour on this point as the aforesaid provision is loud and clear that **"where a Claimant is a Partner State, the Secretary General or any of the institutions of the Community, no security for costs shall be required."** (the underscoring is ours). The Applicant has been sued for and on behalf of the Republic of Uganda which is a Partner State and therefore exempt from the requirement for payment of security for costs.

39. Before we leave this matter, we wish to say the following:

That pursuant to Rule 1 (2) of this Rules of this Court, this Court has inherent powers to grant the Applicant's prayers. The aforesaid Rule gives the Court inherent power to:

> **"Make such orders as, may be necessary for the ends of Justice……"**
>
> The main principle to be applied is whether the dictates of justice so demand. This court has done so in a number of similar cases. (See **The Attorney General of Uganda vs the East African Law Society – Application No.7 of 2012** and very recently in **Angela Amudo vs the Secretary General of the East African Community Case No.1 of 2012)**

40. In view of the foregoing, we accordingly grant the Application as prayed, and order that:

a) The orders issued in **Application No.12 of 2012** be stayed pending the determination of an intended appeal by the Applicant, which must be filed strictly in accordance with Rules of this Court.

b) The costs of the application shall abide the outcome the intended Appeal.

41. We so order.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS……..DAY OF ……2013

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

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JOHN MKWAWA
JUDGE

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ISAAC LENAOLA
JUDGE