THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 1288 OF 2023

(ARISING FROM COA-00-1405 OF 2023)

(ARISING FROM MA NO. 2047 OF 2023)

(ARISNG FROM HCT – 00 – CC-EMA -0310 -2023)

(ARISING FROM CIVIL SUIT NO. 630 OF 2012)

1. AKRIGHT PROJECTS LIMITED
2. KAMUGISHA ANATOLI :::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

H & L EXPORTERS (U) LTD :::::::::::::::::::::::::::::: RESPONDENTS

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Brief Facts

1] The applicants proceeded on a motion under Rules 2(2), 6(2)(b), 42(4), 44 and 50 of the Judicature (Court of Appeal Rules), Section 76 and 98 of Civil Procedure Act. They seek an order of stay of execution in Civil Suit No. 630 of 2012 pending the decision from the Court of Appeal in Civil Appeal No. 1405 of 2023 or until further orders thereof. The applicant in addition prays that costs of the application be provided for.

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2] The application filed by M/s Tumusiime, Irumba & Co. Advocates is premised upon 13 grounds which are contained in the notice of motion. It is contended for the applicant as follows:

i. On the 30th day of October, 2023, Hon Lady Justice Patience T.E Rubagumya, of the High Court of Uganda at Kampala (Commercial Division) delivered the judgement in HCMA No. 2047 of 2023 in favour of the respondent.

ii. During the trial of HCMA No. 2047 of 2023, the applicants raised the issue of issuance of cheques by the 2nd applicant to the director of the respondent which were issued prior to execution of the impugned consents and filling of HCCS No. 630 of 2012 which the Honourable Judge deliberately did not consider in the judgement.

iii. The applicants being dissatisfied with the whole decision of the learned trial Judge then on the 3rd day of November, 2023 lodged in the High Court of Uganda a Notice of Appeal and a letter applying for a typed and certified record of proceedings and judgement and served the same on the respondent through her advocates.

iv. The respondent has filed for execution in this matter vide HCT-00-CC-EMA-0310-2023 (Arising from HCCS No. 630 of 2012) and have proceeded to issue a notice to show cause why execution should not issue.

v. The applicants also filed MA No. 2034 of 2023 (Arising from EMA No. 10 of 2023) in the High Court of Uganda at Kampala (Commercial Division) which was disallowed on grounds of irregularity.

vi. The applicant believes, the execution process by the respondent is brought in bad faith and against the terms agreed on by the parties and the same should be disallowed.

vii. The applicant stands to suffer substantial and irreparable loss if the order for stay of execution of the judgement and Decree in HCCS No. 630 of 2012 pending final determination of Civil Appeal No. 1405/2023, is not granted.

viii. The intended appeal has a very high likelihood of success as it raises serious questions of law and fact.

ix. The application has been made without unreasonable delay.

x. The applicant is under imminent threat of execution and a Notice to Show Cause has already been issued.

xi. The appeal shall be rendered nugatory if the application is not granted

xii. The respondent shall not be prejudiced in any way if the application for stay is granted.

xiii. It is just, fair and equitable that an order for stay of execution doth issue against the respondent pending the determination of the intended appeal.

3] Kamugisha Anatoli the 2nd applicant and Managing Director of the 1st applicant deposed to facts in two affidavits filed to support the motion. His facts are similar to what is stated in the grounds. He added that by the time he filed this application, the applicants had filed a notice of appeal in CA No.1405/2023 (hereinafter the appeal) and applied for the certified record and judgment of the High Court. That the gist of the appeal hinges on the failure of the trial Judge to find that the consent in HCCS No. 630 of 2012 (hereinafter the suit) was marred with irregularities, illegalities and fraud and other matters. In a supplementary affidavit he added that the applicants are under imminent threat of execution and that a Notice to Show cause has been issued and fixed for 31/1/2024.

4] The respondents who were represented by M/S Anguria & Co. Advocates opposed the application. Gafar Janak Persaud deposed to facts in the affidavit in reply to the application. Firstly, he raised three preliminary objections against the application which in his view would determine the application. Further, that the applicants have previously demonstrated that they will not pay the decretal sum in the suit, and it is clear this application is filed to further frustrate the respondent as the judgment creditor, who stands to suffer more injury if this application is granted. For that reason, he prayed that the applicants be ordered to pay security for due

performance in the sum of USD 28,908 and security of costs of Shs. 7,000,000/= as a condition precedent for granting the application. His reasons are firstly, that the pending appeal has no merit because the applicants did not seek mandatory leave of Court before filing it. Secondly, that the letter requesting for the typed and certified record of proceedings were served out of the time prescribed by law and thirdly, Mr. Kamugisha who is not the applicant's attorney had no locus to swear the affidavit in support of the application.

5] Mr. Gafar further deposed that the respondent executed a consent judgement with the applicants to settle the suit wherein it was agreed that they pay a decretal sum of USD 38544 with costs of Ugx 7,000,000/=. However, the applicants failed to honour their part of the consent judgement save that the 2nd applicant handed over certificates of title for land comprised in Busiro Block 395 Plots 2454 and 2453 land at Sekiwunga, which were subsequently confirmed to be road reserves. That at some point, the respondents attempted to have the consent judgment reviewed by filing MA No. 2047/2023 in the High Court which was also dismissed. That as a result, the respondent followed due process to apply for execution of the consent decree and in his view, this application has been brought in bad faith, and the respondent shall suffer hardship as the applicants' intention is to intentionally delay the execution. He stated finally that the pending appeal has no likelihood of success and prayed for dismissal of the application.

Representation.

6] At the hearing of this application, the applicants were represented by Ms. Tumuhirwe Ruth and Mr. Banada Turyamuhebwa, while the respondents were represented by Mr. Kisawuzi Danny. Both counsel filed submissions which I have considered when resolving the application. Their submissions indicated only one issue for determination; i.e. whether the instant application meets the threshold for grant of a substantive order for stay of execution by this Court.

Applicants submissions

7] By way of introduction, Ms. Tumuhirwe and Mr. Turyamuhebwa stated that the instant application meets the threshold for grant of a substantive order for stay of execution. Counsel referred to the case of **Theodre Ssekikubo & others versus Attorney General and Another, Constitutional Application No. 06 of 2013** cited with approval in **Gashumba Maniraguha versus Sam Nkudiye, Civil Application No. 24 of 2015,** where Court restated the principles for grant of an application for stay of execution. The application must establish that his appeal has a likelihood of success; or a *primafacie* case of their right to appeal, it must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted. If 1 and 2 above have not been established, Court must consider where the balance of convenience lies and finally, the applicant must establish that the application was instituted without delay.

8] Counsel then referred to Paragraph 9 of the applicant's affidavit and contended that the appeal has a very high likelihood of success. In particular, the applicants challenge the learned trial Judge's decision in failing to find that the impugned consent in the suit was marred with irregularities, illegalities and fraud which were succinctly proved by the applicant. The decision of the Judge that a person who swore the affidavit in MA 2047 did not have the powers to do so, is also contested.

9] Further, that the applicant has sworn in paragraph 4 of the affidavit in support and paragraph 2 of the supplementary affidavit that the respondent has commenced the execution process and there is therefore a serious threat of execution. Therefore, that should this application not be granted, and execution of the decree in the suit not stayed, the execution will take place and the applicants stand to suffer substantial and irreparable loss and as a result, the appeal shall be rendered nugatory.

10] In conclusion, counsel submitted that the applicant had satisfied the conditions for grant of a substantive order for stay of execution, and that the same be granted.

Respondent's submissions

Respondent's counsel first addressed the preliminary objections to the application.

Objection one

Whether failure by the applicants to seek the mandatory leave of Court before appealing to the Court of Appeal against the orders of the High Court in MA No. 2047 of 2023 is fatal.

11] Respondent's counsel submitted that the applicants ought to have applied for leave to appeal against the order of dismissal of the application for review and setting aside a consent judgement given in Miscellaneous Application No. 2047 of 2023. Counsel referred to Order 44 Rule 1 of the Civil Procedure Rules (as amended) which provides the actions under Section 76 from which an appeal shall lie as of right. For further guidance, counsel referred to Order 44 Rule 1(2), (3) & (4) of the Civil Procedure Rules.

12] Counsel went on to submit that in the instant case, the applicants neither sought nor obtained the mandatory leave either from the High Court or from the Court of Appeal to appeal against the orders of the High Court in Misc App. No. 2047 of 2023 dismissing their application for review and setting aside the consent judgement in High Court Civil Suit No. 630 of 2012. For guidance, counsel cited **Lawrence Musiitwa Kyazze versus Eunice Busingye, Supreme Court Civil Application No. 18 of 1990** and **Dr. Ahmed Muhammed Kisuule versus Greenland Bank (In Liquidation), Supreme Court Civil Application No. 07 of 2010** at page 10.

Objection two

Whether the 2nd applicant Mr. Kamugisha Anatoli has *locus* to swear the affidavit in support of the application.

13] Respondent's counsel submitted that the 2nd applicant Mr. Kamugisha Anatoli has no *locus standi* to swear an affidavit in support of the application before revocation of the powers of attorney ordained to Kiggundu Vincent to take over prosecution of this matter on behalf of the applicants jointly. Counsel cited the case of **Ngaji Textiles Ltd versus AB Popat & 2 others, SCCA No. 05 of 2008** where the Justices of the Supreme Court unanimously agreed that a revocation of the powers of attorney must be in writing, registered and communicated to the person so affected. Counsel noted that this was not done in the instant case and for further guidance, counsel referred to **Fredrick Zaabwe versus Orient Bank (U) Ltd & 5 others, SCCA No. 04 of 2006.**

14] In conclusion, counsel prayed that this Court finds that the 2nd applicant's affidavit in support of the application is void. He prayed that the preliminary objections be upheld.

Submissions on Merits of the Application

15] Respondent's counsel submitted that the grounds for the grant of an order of stay of execution were laid down in the Supreme Court decision of **Gashumaba Maniraguha versus Sam Nkudiye, SCCA No. 24 of 2015** while citing and relying on the case of **Hon. Theodore Ssekikubo & Others versus Attorney General (supra).**

They addressed the grounds as follows: -

Likelihood of success of the appeal

16] Counsel submitted that the applicants' appeal has no chance of success. That the respondent's main interest is to recover USD 38,544 the outstanding balance on the sale of its land the subject of the suit, which the applicants already sold but failed to pay the outstanding balance since 2011. Counsel went on to submit that leave to appeal against the decision dismissing the applicant's application for review had neither been sought nor obtained which omission could impact on the likelihood of success of the applicants' appeal. He stated that failure to seek leave renders the appeal incompetent.

17] In conclusion, counsel prayed that the application be dismissed.

Irreparable loss or damage

18] Respondent's counsel referred to paragraphs 8, 21 and 23 of the respondent's affidavit where it was stated that their client entered into an agreement with the applicants for sale of land measuring 10 acres valued at USD 285,436, which was paid leaving a balance of USD 38,544. Counsel contended that payment of this balance should not result into irreparable harm upon applicants or render the appeal nugatory especially when they have shown unwillingness to pay the outstanding balance.

19] For guidance, to support that submission, counsel drew our attention to the case of **Crane Bank Limited (In Receivership) versus Sudhir Ruparelia & Another, SCCA No. 32 of 2020** where the Court held that an injury is considered irreparable when it

cannot be adequately compensated by an award of damages. Further that, if the loss can be calculated in terms of money, there is no irreparable injury or loss and consequently Court should refuse such an application.

20] In conclusion, counsel prayed that this court finds that there is no substantial loss or damage proved by the applicants to warrant a grant of stay of execution.

Balance of Convenience

21] Counsel submitted that the balance of convenience lies in favour of the respondent who is only seeking to recover USD 38,544 as an outstanding balance on the sale of its property to the applicants and which the applicants have disposed off to third parties. For guidance counsel referred to **Crane Bank Limited (in receivership) versus Sudhir Reparelia & Another (supra)**. In conclusion, he prayed that this Court finds that the balance of convenience lies in favour of the respondent.

Security for costs or due performance.

22] Mr. Kisawuzi submitted that since the respondent is seeking for recovery of USD 38,544, it is proper that Court orders the applicants to deposit three quarters of the decretal sum as a condition precedent for an order of stay, and UGX 7,000,000/= as costs in all applications and the suit below.

23] In conclusion, counsel prayed that Court finds in favour of the respondent and dismisses the instant application with costs.

Analysis and decision of Court

24] I have carefully considered the grounds and evidence presented in the motion, as well as that presented to oppose it. I have in addition considered authorities provided by counsel and those sourced by the Court. Having done so, I note that, that by their submissions, the respondent counsel raised objections to the present application. I will attend to those before delving into the merits of the application.

25] The first objection is whether failure by the applicants to seek the mandatory leave of Court before appealing to the Court of Appeal against the orders of the High Court in MA No. 2047 /2023 is fatal. The objection is raised in line with **order 44 Rules 2** and **3** of the Civil Procedure Rules. In order **44 Rule 1 CPR**, a list of orders from which an appeal may lie without leave are given. It is then stated in order 44 Rule 2 CPR that:-

> *"an appeal under there Rules shall not lie from any order except with the leave of the court* making the order or of the Court to which an appeal would lie if leave were given."

Order 44 Rule 3 CPR provides that;

> *"applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from."*

26] I have deduced from Annexure C to Mr. Kamugisha's affidavit that Civil Application No. 2047/2023 was an application for review under Order 46 Rules 1,2 and 8 CPR (*inter alia*). The application

was denied, and under Order O.46 Rule 1(t) CPR, the applicants would not require to seek leave before lodging their appeal. I note however that the application was denied on two grounds.

i) The preliminary objection raised that fraud could not be proved on affidavit evidence alone, succeeded.

ii) The Judge decided that the applicants here failed to adduce any evidence that would warrant setting aside the consent Judgment/decree.

It follows then that the application was partly dismissed on a point of law under 0rder 6 Rule 29 CPR. That being the case, the applicants here would still require to obtain leave before filling an appeal to this Court.

27] I have perused the Court record and I am satisfied that no application for leave to appeal was filed before the High Court or this Court. In the circumstances, I am satisfied then that the requirements of Order 44 (2) of the CPR have not been met by the applicant. Thus the first objection succeeds.

28] Secondly, the respondent has raised an objection against Mr. Kamugisha Anatoli's capacity to depose to facts in an affidavit to support the application. The reason advanced is that both applicants had before this application appointed one Mr. Vincent Kiggundu as their attorney and he should have been the party to swear the affidavit. During the proceedings of MA No. 2047 of 2023, Mr Kiggundu who was present in Court, confirmed that currently

he is the Secretary of Akright Projects Limited, and proceeding only as their representative in that capacity, but not as its attorney.

29] Even so, I am not aware of any legal prohibition against a person who has previously appointed an attorney from appearing in person or by any other representative in a suit. Mr. Kamugisha is a party to this application. He stated and it is not denied that he is the Managing Director of the 1st applicant. The settled position is that a person most well versed with facts of a case is the one most suited to depose to facts in an affidavit concerning that case. Mr Kamugisha did state in his affidavits that he is fully conversant with all factual matters pertaining to the application. The respondent has not indicated any prejudice by the applicants opting for him to swear the affidavit, and indeed there would be none.

30] Accordingly the second objection fails.

Merits of the Application

31] The powers of this Court to grant an order to stay proceedings is provided for in Rule 6(2)(b) of the Rules of Court. It is provided that:

> *"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-*
>
> *a) 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 a stay of proceedings on such terms as the court may think just"

32] It is trite that the grant of an order for stay of execution is a matter of discretion and there is authority to suggest that such discretion must be exercised judiciously and on well-established principles. Those principles have been re-stated several times. I will consider the principles given by the Supreme Court in her decision of **Theodore Ssekikubo & Ors versus AG & Ors, Constitutional Application No. 6 of 2013**, it was held in part that;

i. The applicant must establish that their appeal has a likelihood of success; or a *primafacie* case of their right to appeal.
ii. The applicant must show that they will suffer irreparable damage, or that the appeal will be rendered nugatory if a stay is not granted.
iii. If the first two above have not been established, court must consider where the balance of convenience lies.
iv. It must be demonstrated that the application was presented without undue delay.

33] With regard to the strength of the appeal, applicants' counsel argued that the trial Judge's decision was marred with irregularities, illegalities and fraud which were succinctly proved by the applicant. The applicants also contend that the execution process by the respondent is brought in bad faith and therefore should be disallowed until the appeal is heard.

34] I am cognizant of the fact that it is not necessary at this stage to pre-empt the consideration of matters necessary in deciding whether or not the appeal would succeed, neither is it incumbent on the applicants to demonstrate the possibility of success of the appeal. However, they are at least required to show that the appeal is not frivolous and vexatious. They have to show that their appeal raises serious questions of law and fact that merit consideration on appeal. On the other hand, I am not blind to the argument that Courts should not make it common practice to deprive successful litigant's fruits of their judgment in anticipation of the outcome of an appeal. See for example, **The Annot Lyle (1886) 11 PD 114 at 116**).

35] I have when resolving the preliminary objections already found that the applicants did not seek leave to appeal before filing their appeal in this Court, which is a mandatory requirement under Order 44 Rules 1 and 2 CPR. With no doubt, that omission should have a direct effect on the likelihood of success of the appeal. In **Dr. Ahmed Muhammed Kissule versus Greenland Bank (In Liquidation) SCCA No. 7 of 2010,** it was found that there must be an appeal in place before the application can be considered. Even without delving into the merits of the appeal, it appears that it has been filed in contravention of the law, and as such, the likelihood of its success is greatly discounted.

36] I note that save for raising this ground, the applicants did not show in their pleadings and evidence how they stand to suffer substantial loss or irreparable damage or that the appeal shall be

rendered nugatory if execution of the consent judgement is not stayed. The respondents on the other side averred that payment of the judgment debt of USD 38,544 will not cause any irreparable damage to the applicants who they believe have applied for stay of execution in bad faith.

37] It is now a settled principle that substantial loss the type envisaged in these type of proceedings, does not represent a particular sum. Instead, it refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal. It was for example held in **Tropical Commodities Supplies Ltd & Others versus International Credit Bank Ltd (in Liquidation), [2004] 2 EA 331) that:**

> *"Substantial though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as the successful parties in the appeal. The loss ought to be of a nature which cannot be undone once inflicted".*

38] The brief facts of this case are that the parties agreed to settle a dispute over a debt of USD 38,544 that the 1st applicant owes the respondent. They did so by entering into a consent judgment on 14/7/2014, which the respondent claims the applicants have now dishonoured. The claim is an ascertainable monetary debt. Should the appeal succeed, then the consent judgment may be unraveled and the applicants absolved of its terms of paying it or any other

such order. Should the appeal fail, then the respondents will be free to execute the consent decree. Under those circumstances, I see no possibility for the applicants to suffer irreparable damage. Both that sum and costs which is monetary, can be recovered from the respondents if at all the appeal succeeds. It has not been shown that the respondents are indigent. Therefore, the remedy of restitution is available to the applicants in the event the appeal is allowed.

39] Should there be any doubt, this Court may need to balance the interests of the applicants who are seeking to preserve the status quo pending the hearing of the appeal so that their appeal is not rendered nugatory, and the interests of the respondent who is seeking to enjoy the fruits of their judgment **(See *Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] EKLR*)**. Mr. Persaud stated in his affidavit that the debt in issue has been outstanding since 2011 and that the consent judgment was executed on 14/7/2014. The applicant did not rebut the evidence that at some point, the 2nd applicant offered land titles to stem off execution, but that both were subsequently found to be road reserves. The applicants did not also rebut the evidence that at some point the 2nd applicant issued bad cheques for the same reason. It is evident then that the respondent who was the successful party has since July 2014 been deprived of a tangible remedy, despite owning the decree. In my view, under those circumstances, the balance of convenience is tilted strongly in their favor.

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40] Consequently, I find no merit in this application and it is dismissed. The costs of the application shall abide the outcome of the appeal.

Dated at Kampala this 23rd of February, 2024

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EVA K. LUSWATA
JUSTICE OF APPEAL