IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Irene Mulyagonja, JA (Single Judge)

CIVIL APPLICATION NO. 22 OF 2024

ARISING FROM Miscellaneous Application No COA-00-CV-0523-2023

(All Arising from HCMA 43 of 2023 and HCCS No. 577 of 2020)

BETWEEN

TROPICAL BANK LIMITED ::::::::::::::::::::::::::APPLICANTS

AND

TAMALE LUKWAGO YAHAYA::::::::::::::::::::::::::::::::::::::RESPONDENT

RULING

This application was brought under rules 2 (2) and 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions SI-10-13, among others, for an order to stay execution of the ex parte decree in **HCCS No 577 of 2019** and the orders in **HCMA No 43 of 2023**, pending the hearing of an application for leave to extend time within which to appeal, and an appeal in this court.

The grounds were stated in the application and affidavit in support affirmed by Bamweyana Asuman, the Company Secretary/Head of Legal & Compliance at the Bank, on 19th January 2024. The respondent opposed the application in an affidavit that he affirmed on 1st March 2024.

The grounds of the application were stated therein and more particularly set out in the affidavit in support thereof. They were briefly

that the respondent sued the Bank in **HCCS No 577 of 2020**. He sought to recover a certificate of title which he claimed to have deposited with the Bank as security for a loan. The Bank filed a Written Statement of Defence (WSD) in which it was denied that the applicant deposited the certificate of title with them. In spite of this defence, the court heard the respondent ex parte due to non-attendance of the applicant, and judgment was delivered in which the Bank was ordered to deliver the certificate of title to the respondent.

The applicant Bank filed **HCMA No 43 of 2023**, in which she sought to set aside the ex parte judgment and decree on the ground that service of the hearing notice on it was ineffective. The application was dismissed and while dismissing it, the court found that service of the hearing notice on an unidentified person at the Bank was good service.

The Bank filed a Notice to Appeal together with an application for extension of time within which to appeal and requested for the record of the High Court. The Bank also filed an application for stay of execution in the High Court, as well as an application for an interim order to the same effect and both were dismissed with costs. It then filed an application in this court for leave to extend time within which to appeal and an appeal.

The application to stay execution was filed because the respondent obtained and was in possession of a warrant of attachment in execution of the decree in **HCMA No 0557 of 2020** and **HCMA No 43 of 2023**. They contended that the applicant will suffer irreparable damage and/or substantial loss if this application is not granted; and the application for leave to extend time within which to appeal will be rendered nugatory. Further that the execution will inflict hardship on

the Bank because it cannot deliver a certificate of title to the respondent, which it does not possess.

In his affidavit in reply the respondent stated that he was informed by his lawyers that it was not true that the applicant Bank was never served with a hearing notice before the hearing of **HCCS 577 of 2020**. That the applicant was duly served with a hearing notice at her registered head office and it was received and duly stamped. He emphasised that the return of service showed the official stamp of the Bank.

He further averred that on the 24th June, a Notice to Show Cause why execution should not issue in the suit was served at the same office and received by the Secretary of the Managing Director, who stamped with the same stamp. That the hearing notices for summons for directions were also received and acknowledged using the same stamp after which Mr Bamweyana appeared before the Registrar of the court on the summons for directions.

That upon proof by affidavit of service deposed by Ssemanda Eddy filed on 31st May 2021, the trial judge allowed his Advocate to proceed ex parte and judgment was delivered on 25th March 2022. That the bill of costs was taxed and allowed at UGX 38,113,709 and execution ensued thereafter.

At the hearing of the application, the applicant was represented by Mr Dennis Kyewalabye while the respondent was represented by Mr Emmanuel Kiyingi. The respondent was present in court.

Both counsel filed written submissions prior to the hearing and prayed that they be considered in the disposal of the application. Having

considered the submissions before, an ex tempore ruling was given but I promised to substantiate the reasons for it and now hereby do so.

Submissions of Counsel

Counsel for the applicant submitted that the High Court relied on a defective affidavit of service to proceed ex parte and deliver judgment against the application. That the process server failed to identify the person who received the hearing notice at the Bank. Further, that though the applicant filed applications for stay of execution and setting aside of the ex parte judgment, they were dismissed. That the applicant had since filed a Notice of Appeal and an application for extension of time within which to appeal.

Counsel pointed out that in the ex parte judgment, the High Court ordered the applicant to hand over or deliver the contested certificate of title to the respondent yet the applicant does not have it. That the applicant cannot even process a special certificate of title because that is in the power of the respondent alone. That is therefore not possible for the applicant to comply with the order, and the court did not make an order that she be liable for the cost of obtaining such title if the respondent applies for it to be issued.

Counsel went on to submit that the ruling in **HCMA No 43 of 2023**, wherein the applicant applied to set aside the ex parte judgment, was delivered electronically. No notification was given to the applicant and they learnt about it only after the respondent took out execution proceedings. That the applicant thus filed a Notice of Appeal under rule 76 (4) of the Rules of this Court and a letter requesting for proceedings. The applicant also commenced an application for leave to appeal in this court, as **COA-00-CV-Cl-0523-2023**, but there is imminent danger of execution because the respondent obtained a warrant for attachment

and sale of the applicant's property. He explained that the execution includes recovery of the impugned certificate of title from the applicant which they do not have, and they cannot obtain another one.

Counsel relied on rules 2 (2), 6 (2) (b) and 76 (4) of the Rules of this Court to support the application. He argued that under rule 76 (2) Notice of Appeal shall be lodged within 14 days of the decision appealed against. That in the event that the litigant is unable to file it within the designated time frame, such a litigant may apply to the court for extension of time under rule 5 of the Rules of this Court. Further, that under rule 76 (4), a litigant who requires extension of time within which to appeal may nonetheless file a Notice of Appeal pending the grant of such leave, and that is what the applicant here did.

For the principles for the grant of orders for stay of execution in this court, counsel for the applicant referred to the decision in **Kyambogo University v. Professor Isaiah Omolo Ndiege, CACA No 341 of 2013** where Kakuru, JA laid down 7 principles that the court may rely upon to grant orders. He went on to explain that the application now before court meets all of the 7 criteria that were laid down in that case. He prayed that an order be granted to stay execution of the orders of the High Court pending the hearing of the application for extension of time within which to appeal.

In reply, counsel for the respondent agreed that the principles were laid down in the case of **Kyambogo University v Ndiege** (supra). He submitted that proof of filing a Notice of Appeal is key in determining applications for stay of execution. That the applicant conceded that he filed his notice of appeal out of time, thus the need to file an application for extension of time. That the Notice of Appeal that was attached to the

affidavit in support of the application was thus a clear violation of rule 76(2) of the Rules of this Court.

Counsel went on to submit that the application does not meet the criterion of being filed without unreasonable delay because the ruling in **Misc. Application No 43 of 2023** was delivered on 31st May 2023 and uploaded on ECCMIS on the same day. That the applicant admitted this, though counsel for the applicant stated that he received no notification thereof on his ECCMIS account. He invited court to follow the decision of the High Court in **Mwesigye Nicholas v. P & A Credit Investment Ltd, Misc. Application No 1677 of 2022**, where the court held that because the system is automated, it is practically impossible for the notifications to be selectively sent only to the respondent. He charged that it was thus impossible that the applicant's lawyer did not receive the notification in his account.

He added that since the applicant's counsel admitted that they filed this application in August 2023, yet the decision was uploaded on ECCMIS on 31st May 2023, it was impossible for him not to receive due notification on his account. He prayed that court finds that there was unreasonable delay in filing the application.

With regard to the application for extension of time to lodge an appeal, counsel submitted that it has no likelihood of success. He asserted that the mere presence of an appeal does not operate to stay execution and it was outright negligence on the part of the applicant not follow up on their case. That the application for extension of time based on the ground that they did not receive the ECCMIS notification, leading to failure to lodge the Notice of Appeal means that the appeal lacks merit, is frivolous and vexatious and an abuse of the process of the court.

With regard to the threat of execution, counsel for the respondent submitted that the applicant did not attach to their affidavit a renewal of the warrant of attachment. That in the absence of such warrant this court cannot act on speculation and anticipation. He also submitted that it has not been shown that substantial loss would be visited upon the applicant if execution is not stayed.

Determination

The principles upon which orders to stay execution are granted by the appellate courts were stated by the Supreme Court in **Theodore Ssekikubo & Others v. AG, SC Const. Application No 6 of 2013** as follows:

i. The applicant will suffer irreparable damage or the appeal will be rendered nugatory if the order is not granted;
ii. The appeal has a strong likelihood of success, or a prima facie case of the right to appeal;
iii. If 1 and 2 have not been established, the court must consider where the balance of convenience lies; and
iv. The application has been brought without delay.

The power of this court to grant orders to stay execution is provided for in rule 6 (2) (b) of the Rules of this Court as follows:

> **(2) Subject to subrule (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) ...**
>
> **(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 a stay of proceedings on such terms as the court may think just.**

Rule 76 provides of the same Rules provides, in part, as follows:

76. Notice of appeal in civil appeals.

(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.

(2) Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.

(3) ...

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal.

In this case, counsel for the applicant admits that the Notice of Appeal was filed late because he did not get notification on ECCMIS that court rendered the decision from which he seeks to appeal. I have considered the decision of the High Court Commercial Division in **Mwesigye Nicholas** (supra), commended to me by counsel for the respondent, that because ECCMIS is an electronic system and thus notifications are automated, it is not possible for them to be sent selectively to one party. However, though it may be persuasive, it is not binding on this court.

Instead, this court takes judicial notice of the fact that ECCMIS is still a new system that was adopted by the Judiciary to manage its case load in March 2022; it has thus been in operation for only 2 years. The users have yet to get fully acquainted with the operations and use of the system. Glitches can therefore not be put past it, either from technical errors or improper use of the system.

I will therefore accept the applicant's lawyer's statement that he did not receive notification of the uploading of the decision, for whatever reason. And even if he did, the decision was not uploaded to an account that is held by the applicant who is the party to the suit. The failure or neglect of her Advocate to receive the notification or follow up the case therefore cannot be visited upon her, for it is n trite law that the mistake of an

Advocate shall not be visited on an unsuspecting client. Having found so, I am of the view that the delay in obtaining a copy of the decision for a period of 2 or so months justifies the application for leave to extend time within which to appeal.

It is evident from the record that the applicant lodged in the High Court a Notice of Appeal dated 26th July 2023. It was endorsed by the Registrar on 2nd August 2023 and received in this court on 3rd August 2023. Rule 76 (4), the second limb thereof, therefore applies to the Notice that was filed and it may be validated by this court on the hearing of the application for extension of time within which to appeal.

As to whether the applicant will suffer irreparable damage if this application is not granted, what is present on the record is that the respondent took out execution proceedings and a Notice to Show Cause why execution should not issue was signed by the Registrar of the High Court on 7th December 2023 (**Annexure C** to the affidavit in support of the Application). Though it was stated in the application that a warrant issued for execution, the same was not exhibited in court. However, the respondent in paragraph 54 of his affidavit in reply admits that a warrant of attachment issued in respect of which the applicant was playing dilatory tactics and frustrating execution. He did not state how much money was involved but a bill of costs was taxed an allowed at UGX 38,113,709/= (**Annexure G** to the affidavit in reply). The respondent was also awarded general damages to the tune of UGX 20,000,000.

The combined effect of the two is that though the warrant of attachment was not on the record, the respondent is capable of enforcing the collection of the taxed costs and the general damages amounting to UGX 58,113,709, by extending the said warrant of attachement. The applicant would also have to produce the impugned certificate of title

as it was ordered by the trial judge, which she says she does not have. It is to that extent that the applicant may suffer damage, though not irreparable. And if it is indeed true that the applicant does not hold the certificate of title, great inconvenience would be occasioned for she cannot obtain a special certificate of title without the cooperation of the respondent, who insists that she has it.

As to whether the appeal will be rendered nugatory if the order is not granted, I think that it will. As a general rule, one does not approbate and reprobate. Once the order is executed, the application for leave to extend time within which to appeal would be rendered nugatory.

Finally, it must be determined whether the proposed appeal has any chances of success; or if the applicant has presented a prima facie case of the right to appeal. The main contention raised by the applicant and in respect of which she seeks leave to appeal is that she was not served with a hearing notice, which resulted in the absence of her Advocate at the hearing and the grant of an ex parte judgment. Counsel for the applicant contends that the service said to have been effected upon the applicant was ineffective and ought not to have resulted in an ex parte judgment against her.

According to the judgment of the court in High Court Commercial Division **Civil Suit No 577 of 2020**, the plaintiff's claim was for unconditional release of the certificate of title for land comprised in Busiro Block 376 Plot 603 at Katale, general and exemplary damages with interest thereon at court rate, from the date of judgment till payment in full. The defendant denied in its WSD that they received the certificate of title from the respondent. They also denied that he was entitled to the remedies claimed.

On failure of the defendant to appear on the date that the suit was fixed for hearing, the court proceeded to hear the suit ex parte, ostensibly because it was proved that there was effective service on the applicant.

The court heard the evidence of the respondent alone, from two witnesses, and then came to the conclusion that the applicant was in breach of a loan and mortgage agreement because it failed to release a certificate of title deposited with the bank. She ordered the applicant to release the title and granted general damages to the respondent. The applicant now claims that service was ineffective and that is the main ground to be addressed in the proposed appeal, for which an application for leave to extend time for filing is pending before this court.

Order 9 rule 20 (1) of the CPR provides that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the summons or notice of the hearing was duly served, it may proceed ex parte. Service of summons is provided for by order V rule 1 of the Civil Procedure Rules as follows:

> **1. Summons.**
>
> **(1) When a suit has been duly instituted a summons may be issued to the defendant—**
>
> **(a) ordering him or her to file a defence within a time to be specified in the summons; or**
>
> **(b) ordering him or her to appear and answer the claim on a day to be specified in the summons.**

There is no specific provision for the service of hearing notices in the CPR. The rules on service of summons are the nearest that can be applied to the service of hearing notices and the courts have in many cases held so.

In this case, service of the hearing notice is said to have been effected at the defendant/applicant's place of work which was given in the

affidavit of service deposed by a process server, Ssemanda Eddy (**Annexure B** to the affidavit in support of the application) on 31st May 2021. He stated in the said affidavit that on the 16th day of April 2016, he effected service on the Secretary to the Managing Director, at the Bank's work place given as Plot 27 Kampala Road. That he introduced himself to the "Secretary to the Managing Director" and informed her about the reasons for his visit and she accepted service, by stamping on the return of the hearing notice. The hearing notice was attached to the affidavit of the process server as is required by Order 5 rule 16 of the CPR. The court found that this was effective service and entered an ex parte judgment against the applicant.

Counsel for the applicant contends that the place and person to be served on behalf of the applicant was stated in the WSD as *"the Legal Services Department of Tropical Bank (U) Ltd at Plot 27, Kampala Road."* He further averred that he was the head of that department and the rationale for directing service on the Legal Department was to ensure that court process is received by officers of the Bank who understand the implications of court process. That the respondent and his Advocates deliberately did not serve as indicated and as a result, the applicant did not participate in the hearing and judgment passed ex parte. Counsel for the applicant further contends that the rules about service on corporations in Order 29 CPR were not followed.

In her decision wherein she declined to set aside the ex parte judgement entered in HCCS No 577 of 2020 against the applicant for failure to attend the hearing, the trial judge, at page 4 thereof, stated thus:

> *"It is my considered view that much as the affidavit of service does not disclose the name of the secretary, that was not prejudicial to the Applicant Bank, since the Applicant's secretary was actually served, and the applicant filed their written statement of Defence based on the said acknowledgement by the Secretary."*

Order 29 rule 2 CPR provides for service upon corporations as follows:

> **2. Service on corporation.**
>
> **Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—**
>
> > **(a) on the secretary, or on any director or other principal officer of the corporation; or**
> >
> > **(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business.**

In this case, the applicant specifically opted for service under rule 2 (a) of Order 29 and it was stated in the WSD. Order 9 rule 15 provides for the defendant giving an address of service on receipt of the plaint in the following terms:

> **Each defendant upon whom a summons requiring him or her to appear and answer a claim has been served shall at or before the first attendance under rule 14 of this Order file a memorandum giving an address for service and shall deliver a duplicate of the memorandum to the opposite party.**

The applicant did not file a memorandum giving the address of service but placed it in the WSD. In my view, this answered the requirements of Order 9 rule 15 CPR. The trial judge therefore seems to have erroneously considered that since the plaint was served at the same place and the applicant was not prejudiced and filed a WSD. The position, in my view, changed when the applicant specifically opted to be served at a particular address, within the ambit of Order 9 rule 15 CPR. The respondent does not show why they opted to serve otherwise.

The Supreme Court in **Geoffrey Gatete & Angela Maria Nakigonya v. William Kyobe, SCCA No. 7 of 2005** considered what is to be considered as effective service. Mulenga, JSC, with whom the rest of the court agreed, had this to say:

"The Oxford advanced learner's dictionary defines the word "effective" to mean "having the desired effect; producing the intended result". In that context, effective service of summons means service of summons that produces the desired or intended result. Conversely, (in) ineffective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in the civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. ..."

I am therefore of the view that the applicant's appeal has a strong likelihood of success and ought to be protected because the respondent did at one time succeed in obtaining a warrant of attachment in execution of the decree in **HCCS No 0557 of 2020** and **HCMA No 43 of 2023**, which may be extended. It cannot be put past him that he would make further efforts to do so in the absence of an order to stay execution. I say so because while Order 22 rule 19 of the CPR provides for notice to show cause against execution in certain cases as follows:

19. Notice to show cause against execution in certain cases.

(1) Where an application for execution is made—

(a) more than one year after the date of the decree; or

(b) against the legal representative of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her; except that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him or her.

{Emphasis added}

The court may also issue orders to execute without issuing notice to show cause as it is provided for in rule 19 (2) as follows:

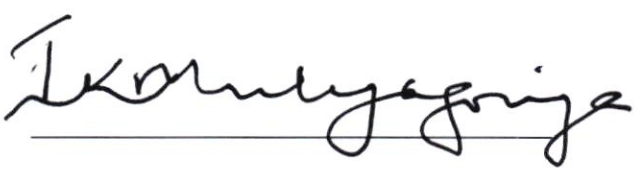
> **(2) Nothing in subrule (1) of this rule shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice prescribed in that subrule if, for reasons to be recorded, it considers that the issue of the notice would cause unreasonable delay or would defeat the ends of justice.**

Since a warrant of execution issued before, nothing would preclude court from issuing another warrant under the provision above, without any notice to the applicant.

The upshot of this decision therefore is that, an order shall issue in favour of the applicant to stay the execution of the decree in **HCCS No. 0557 of 2020** till final disposal of Court of Appeal **Civil Application No. 0523 of 2023** for extension of time within which to appeal. The costs of this application shall be in the cause.

The Registrar of this court is hereby further directed to fix the application for leave to appeal within a period of one month from the delivery of this ruling to prevent the possible abuse of the order by the applicant.

Dated at Kampala this 19th day of March March 2024.



Irene Mulyagonja

JUSTICE OF APPEAL