THE REPUBLIC OF UGANDA

Coram: Irene Mulyagonja, JA (Single Judge)

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 40 of 2023

ARISING FROM CIVIL APPEAL NO. 497 OF 2022

(All arising from High Court (Commercial Division) Miscellaneous Application No. 1430 of 2021 & Civil Suit No. 652 of 2021)

1. WK'S HARDWARE LTD
2. WAMUKWE KADIRI
3. JOHN KHAUKHA
4. NAMUTOSI ZAINABU
5. FATUMA KAINSA

:::::::::::::::::::: APPLICANTS

VERSUS

DIAMOND TRUST BANK (U) LTD :::::::::::::::::::::::::::: RESPONDENT

RULING

Introduction

This application was brought under section 98 of the Civil Procedure Act, section 38 of the Judicature Act, and rules 2 (2), 6 (2) (b), 42 (2), 43 (1), 44 and 53 (2) (b) and (d) of the Judicature (Court of Appeal Rules) Directions (SI-13-10).

The applicants sought orders to stay execution of the orders in **Miscellaneous Application No. 1430 of 2021**, arising from **HCCS No.**

652 of 2021, pending the hearing and determination of the appeal in this court, and that the costs of this application be provided for.

Background

The background to the application was that the respondent Bank filed a summary suit under Order 36 rules 1 and 2 of the Civil Procedure Rules (CPR) against the applicants in the High Court Commercial Division as **Civil Suit No. 652 of 2021**. They sought to recover UGX. 8,445,259,566, interest on the same, penal interest and costs of the suit. The applicants then filed **Misc. Application No. 1430 of 2021** in which they sought leave to appear and defend the suit. The application was heard in the absence of the applicants on the basis of the affidavit in support thereof and dismissed by the trial judge for the reason that, in his view, the proposed defence did not present an arguable defence either in law or fact. Judgment was thus on 13th April 2022 entered in favour of the bank in **Civil Suit No. 652 of 2021** under Order 36 rule 5 CPR for the applicant to pay UGX 8,444,259,566, with interest at 17% p.a. from the date of filing the suit till payment in full.

Dissatisfied with the decision, the applicants filed a notice of appeal in the High Court on 17th June 2022. They also filed an application to validate the notice of appeal in this court and an application in the High Court for stay of execution but the latter was dismissed, hence this application.

The grounds upon which the application was based were set out in the application but more particularly in the affidavit of Wamukwe Kadiri, the 2nd applicant, dated 8th February 2023.

In his affidavit in support, Wamukwe Kadiri averred that **Miscellaneous Application No. 1430 of 2021,** for leave to appear and defend, was disposed of in the absence of the applicants and without a formal hearing. That this was notwithstanding several correspondences from the applicants' Advocates seeking for a hearing date. That they only got to know about the ruling through the respondent's Advocates when they were demanding payment of the decretal sum.

Further, that the applicants filed in this court an application to have the notice of appeal which was filed on 24th June 2022 validated and or extension of time within which to file and serve the notice of appeal. He further averred that the respondent has embarked on the process of execution by extracting a notice to show cause why execution should not issue, which was served upon the applicants. He asserted that the 4th and 5th applicants do not have any interest in **HCCS 652 of 2021** as they have never had any relationship with the respondent bank.

Further, that the applicants are willing to furnish security for costs for the due performance of the decree. And in addition that the appeal pending before this court has high chances of success and there is imminent danger of execution of the judgment and decree taking effect before the disposal of the appeal which was properly filed. That the execution is intended to enforce mortgages and transactions whose legality is under litigation in **HCCS No. 578 of 2021** and **HCCS No. 755 of 2021,** which are still pending disposal in the High Court.

He concluded that there is a high likelihood of the applicant suffering substantial loss if this application is not granted. And that this application

was filed without unreasonable delay and if not granted, it will render the appeal nugatory.

The respondent opposed the application in an affidavit deposed by Sandra Nazziwa, a legal officer with the respondent bank, on 19th July 2023. She averred that this application has no legal basis because there is no valid appeal before this court, because the notice of appeal was filed more than 14 days after judgment was entered in **Civil Suit No 652 of 2021**, contrary to the provisions of section 76 (2) of the Rules of this Court.

In addition, that the applicants' appeal has no chances of success whatsoever because the decretal sums were borrowed from the respondent bank and have never been paid back to date.

Representation

When this matter came up for hearing on 7th March, 2024, the applicants were represented by Mr. Asuman Nyonyintono. Mr. Stephen Zimula represented the respondent. Both parties filed written submissions before the hearing and orally addressed court on some of the issues in the application. Both have been considered in arriving at the decision in this ruling.

Submissions of Counsel

Mr. Nyonyintono, for the applicant submitted that the applicants satisfied the conditions for the grant of stay of execution by this court. He relied on rules 2 (2), 6 (2) (b) and 42 (1) of the Rules of this Court. He also referred to **Kansiime Andrew v. Himalaya Traders Ltd & 6 Others; Civil Appeal No. 279 of 2017**, with regard to the conditions to be satisfied before court

grants an order for stay of execution pending an appeal, which he stated were as follows: i) there must be a pending appeal; ii) the application for stay of execution should have been lodged in the High Court first and refused; iii) sufficient cause should be shown why the judgment creditor should postpone the enjoyment of his/her benefits; it must be shown that if execution proceeds there may be irreparable loss caused.

As to whether there is a pending appeal, counsel submitted that the applicants filed their notice of appeal and a letter requesting for the record in this court on 12th December 2012 and the respondent's lawyers were served with the same on 14th December 2012. That they also filed **Miscellaneous Application No. 851 of 2022** to have the notice of appeal validated or the time within which to file and serve it upon the respondents extended, on 14th December 2022. For this reason, counsel submitted that there is a pending appeal before this court.

With regard to the requirement that the application for stay of execution ought to have been filed first in the High Court, he referred to the decision in **Luwalira Martin Deogratious & Another v. Lwanga Enock and Another; Civil Application No. 201 of 2021,** where it was held that this court and the High Court have concurrent jurisdiction in applications of this nature. That applications should be filed in the High Court first but where exceptional circumstances exist, they can be filed directly in the Court of Appeal.

As to whether there will be irreparable loss caused if execution proceeds, counsel referred to the decision in **Tropical Commodities Supplies Ltd & 2 Others v. International Credit Bank Ltd (In Liquidation) (2004) 2 EA 331**, where it was held that substantial loss does not represent any

particular amount or size; it cannot be quantified by particular mathematical formula but it refers to any loss great or small; of real worth or value, distinguished from a loss that is merely normal. He submitted that substantial loss to be suffered in this case is the liberty and freedom of the applicants who have been served with warrants of arrest and yet an appeal has been duly lodged in this court that has a high likelihood of success.

Counsel further referred to **Uganda Revenue Authority v. National Social Security Fund, Civil Application No. 43 of 2023,** where the principles approved by the Supreme Court in **Theodore Ssekikubo v Attorney General, Constitutional Application No. 6 of 2013**, for the grant of applications of this nature were re-stated.

He went on to submit on the balance of convenience, relying on **Uganda Revenue Authority v. National Social Security Fund (supra)** stating that the balance of convenience lies in favour of the applicants who have duly filed an appeal which needs to be protected in order not to render it nugatory.

In reply, Mr. Zimula for the respondent submitted that this application is based on an incompetent notice of appeal and that it ought to fail. He stated that the applicants filed a notice of appeal and a letter requesting for proceedings in this court on 24th June, 2022, which was two months from the date of judgment. He made reference to rule 76 (1) & (2) of the Rules of this court and submitted that the notice of appeal was filed out of time and that it has to-date not been validated. He contended that this court cannot rely on an incompetent notice of appeal to grant a stay of execution nor an interim order to that effect. Counsel referred to **Herbert**

Semakula Musoke & Another v. Lawrence Nabamba & 2 Others; Supreme Court Civil Application No. 22 of 2019 where the notice of appeal filed in this court was struck out because it was filed out of time. He prayed that this application be dismissed with costs.

Determination

The right to apply for an order to stay execution of the orders of the lower court pending hearing of an appeal before this court is drawn from rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions, which provides as follows:

> **(2) 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) ...**
>
> **(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.**

The principles upon which this court relies to grant orders to stay execution pending appeal were laid down by the former Court of Appeal in **Lawrence Musiitwa Kyazze v. Eunice Busingye; Civil Application No. 18 of 1990** where it was held that parties seeking such orders should meet three conditions;

i. Substantial loss may result to the applicant unless the order is made;
ii. The application has been made without unreasonable delay; and
iii. The applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

These principles were re-stated by the Supreme Court in **Theodore Ssekikubo & Others v. Attorney General; Supreme Court Constitutional 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 likelihood of success, or a prima facie case of his right to appeal;
iii. If 1 and 2 above has not been established, the court must consider where the balance of convenience lies; and
iv. The application was instituted without delay

The applicants in this matter submit that their application satisfied all the above criteria and that court should grant an order to stay execution. However, the respondent maintains that this application is bad in law as it is based on an incompetent and invalid notice of appeal.

At the hearing of this matter and in his written submissions, Counsel for the applicants admitted to court that the notice of appeal was filed out of time by the applicants' former Advocates, Masanga and Company Advocates. That this was because after filing an application for leave to appear and defend the summary suit that had been instituted by the respondents herein, they sent several correspondences to the court in a bid to have the application fixed for hearing, but this all seemed to be in vein. That the application was eventually heard and dismissed in their absence and an ex tempore ruling made, thereby passing a default judgment in favour of the respondent bank for the recovery of the decretal sum, interest and costs, on 13th April 2022.

The applicants have not informed court exactly when they got wind of the said judgment and subsequent decree but I have perused **Annexure 'G'** to the affidavit in support of this application where it is stated that they got to know about the ruling they seek to appeal against on 17th May, 2022. In spite of that, it is evident that the applicants filed their notice of appeal first in the High Court on 17th June 2022, one month later as opposed to the 14 days that are required by rule 76 (2) of the Rules of this court. The said notice of appeal was received by the respondent's Advocates on 29th June 2022.

It is also clear that the applicants filed **Miscellaneous Application No. 851 of 2022** in this court, seeking mainly to validate the notice of appeal that was filed out of time or to extend the time within which to file and serve it upon the respondents. In that regard, rule 76 (4) of the Rules of this court provides that:

> **(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.**

The application to validate the same is permitted at the discretion of the court under rule 5 of the Rules of this court where the applicant demonstrates that there is sufficient reason to so extend the time for doing the act that the applicant needs to do. The application shall therefore be considered by court when it is called on for hearing, but for purposes of rule 76 (4) of the Rules of this court, the applicant filed a notice of appeal in the High Court and that requirement has been satisfied.

Ikon.

I shall now proceed to determine whether the applicants are deserving of the orders sought by fulfilling the criteria laid out in **Theodore Ssekikubo** (supra).

As to whether the applicants will suffer irreparable damage or whether the appeal will be rendered nugatory if the order is not granted, the applicants stated that if this order is not granted, they will suffer great loss as the respondent has already embarked on the process of execution by serving upon them a Notice to Show Cause as to why execution should not issue. They also state that they will lose their liberty and freedom since arrest warrants have been served upon them.

I have perused the record and found that the said notice, marked as **Annexure 'I'** to the affidavit of the second applicant, was served upon and received by the second applicant on 3rd October 2022. According to the notice, the applicants were to appear in court on 4th October 2022, to show cause why execution should not issue against them. Together with this notice is an application for execution of a decree where the suggested mode of execution is by arrest and committal of the defendants to civil prison. There is no evidence of other steps taken by the respondent towards execution. A long time has passed since 4th October 2022 when the applicants were required to appear in court and nothing has happened to them. I therefore find that there is no imminent threat of execution that would warrant the grant of an order to stay execution.

As to whether the appeal has a likelihood of success or whether there is a prima facie case of the right to appeal, the applicants have said nothing in their application. The only statement that could be inferred to relate to this criterion is that contained in paragraphs 5 of the affidavit in support, that

without a formal hearing and notwithstanding the fact that correspondence seeking for a hearing date that the applicant's lawyers wrote, the trial judge disposed of the application for leave to appear and defend in their absence. This would infer that the applicants were not accorded the right to be heard on the application.

However, perusal of the decision of the trial judge shows that he carefully weighed his options before he proceeded to dispose of the matter in their absence as follows:

> *"Court: according to Order 9 rule 22 of the Civil Procedure Rules, where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing, the court is required to make an order that the suit be dismissed, unless the defendant admits the claim, or part of it. Since the absence of the applicants is unexplained and the respondent had not conceded to the application, the application would have been dismissed but since the applicant's pleading are on record, I will proceed to consider the merits of the application."*

The trial judge then proceeded to analyse the defence that was set up by the applicants in their application for leave to defend, in my view, in great detail, considering the requirements of the law that relates to such applications, and carefully. He then came to his decision on the matter as follows:

> *"The law requires that the defendant, in his affidavit supporting the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. All that the court requires, in deciding whether the applicant has set out a bona fide defence, is: (a) whether the applicant has disclosed the nature and grounds of its defence; and (b) whether on the facts so disclosed the applicant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.*
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> ...

A frivolous defence is one whose intention is to stall and wrongly delay settlement of a legitimate claim. By raising frivolous defences and defending the indefensible, such tactics needlessly prolong cases, waste court's time and other resources. A defence is frivolous where it lacks arguable basis either in law or fact. Put another way, a defence is frivolous when either (1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the defence is based on an indisputably meritless legal theory. The proposed defence by the applicant: that the money was disbursed belatedly, that the applicant was a victim of misrepresentation and that the money disbursed was less than what had been agreed upon are clearly a sham in the light of the documentary evidence attached to the plaint, and in the light of submissions of counsel for the respondent. According to Order 6 rule 30 (1) of the Civil Procedure Rules, the court may order any pleading to be struck out on the ground that it discloses no reasonable answer and in case of the defence being shown by the pleadings to be frivolous, may order judgment to be entered accordingly, as may be just.

Having perused the affidavit in support of the application, considered the submissions of counsel for the respondent and the intended defence, I have formed the view that the proposed defence does not present an arguable basis either in law or fact. The application accordingly fails and is hereby dismissed with costs to the respondent."

It is evident that in the absence of the applicants, the trial judge bent over backwards to analyse their proposed defence in the light of the plaint and the documents that were filed by the respondent in support of her claim. He found nothing to convince him that this was a case that would benefit from a hearing of any further evidence in a full trial. He thus entered judgment and a decree in favour of the plaintiff/respondent.

And for those reasons, the applicants have not been able to state what their grounds of appeal would be in this court. In his submissions on that point, counsel for the applicant simply states that *"... in paragraph 15 of his affidavit in support of the application, the 2nd applicant avers that the intended appeal has a high chance of success."* He does not explain to court

why the applicant states so. Neither did he find reason to fault the trial judge in his elaborate ruling on the application for leave to defend the suit.

I therefore find that the applicant did not satisfy court that the intended appeal has any likelihood of success.

Regarding the balance of convenience, this court needs to balance the interests of the applicants and those of the respondent. It has been established from the record that the 1st applicant company, in 2019, took out various facilities from the respondent bank, amounting to more than 8 billion Uganda shillings. Upon failure to pay back the loans, the respondent bank instituted **High Court Civil Suit No. 652 of 2021** seeking to recover the said monies. This matter was disposed of in the High Court in April, 2022 and since then the respondent has been denied a tangible remedy despite holding a decree.

The applicants claim that the execution in this matter is intended to enforce mortgages and transactions whose legality is under litigation in **HCCS No 578 of 2021** and **HCCS No 755 of 2021**, said to have been attached as Annexes K and L to the affidavit in support. However, Annexure L relates to HCCS No 39 of 2020, while Annexure K relates to HCCS No 66 of 2022. The plaintiffs therein claim that certain properties that were mortgaged to the respondent Bank were mortgaged without the authority of the owners, the plaintiffs in those suit. The plaintiffs thus seek to prevent the recovery of the debt by executing the decree by enforcement of the mortgages held by the bank.

However, the respondents did not seek to dispose of the mortgaged property when they applied for notice to show cause why execution should not issue against the applicants. The application for execution, **Annexure**

I, shows that the preferred mode of execution was by the arrest and committal to civil prison of Wamukwe Kadiri, John Kaukha, Namutosi Zainabu and Fatuma Kainsa. The arguments in respect of the mortgages and their validity therefore do not come into issue in this application and I did not consider them.

As to whether the application was filed without delay, I note that the application for stay of execution that was filed in the High Court was dismissed on 23rd January 2023. The applicants filed this application on 14th February 2023, which was 22 days from the date of the dismissal of the application. However, the judgment and decree that they seek to appeal against was delivered on 13th April 2022. They did not file notice of appeal in the High Court until 17th June 2022, about two months after the delivery of the judgment and issue of a decree. The reason that they advanced was that they only got to know that judgment was given against them when the respondent's Advocates demanded for payment of the decretal sum.

The copy of notice to show cause why execution should not issue for recovery of UGX 9,402,388,983 was received by Wamukwe Kadiri on 3rd October 2022; it was attached to the affidavit in support as **Annexure I**. If it is indeed true that the applicants did not get to know about the judgment in default when it was delivered till then, the 3rd October 2022 would be the date when they got to know about it. However, it is evident that the applicants filed their notice of appeal in the High Court, **Annexure E** to the affidavit in support, on 17th June 2022. It was endorsed by the Registrar on 20th June 2022. It is therefore not true that the applicants only got to know about the default judgment on or around 3rd October 2022. The applicants were aware of the judgment earlier, on 17th May

2022, as it was stated in the Court of Appeal Civil Application No. 851 of 2022, but they filed their notice of appeal on 17th June 2022. In view of the fact that the amount claimed in the decree is UGX 9,402,388,983, it would appear to me that the notice of appeal was filed as an afterthought. Further, in view of the hefty sum that was awarded to the respondents in the suit, the filing of this application more than 2 weeks after the dismissal of the application for stay of execution in the High Court also amounted to delay, though not inordinate.

It is apparent that though they took the money, the applicants clearly have no intention of paying off the loans. They have gone ahead to challenge the mortgages held by the bank over several properties leaving that bank in a difficult situation where it has to seek other remedies other than the enforcement of the mortgages. The applicants act in concert with each other to achieve this, as it is shown in the pleadings attached to the affidavit in support of the application as Annexure K and L.

In conclusion therefore, though the application was brought to this court without inordinate delay, the balance of convenience lies in favour of the respondents. The application is therefore hereby dismissed with costs to the respondents.

Dated at Kampala this 26th day of March 2024.

Irene Mulyagonja

JUSTICE OF APPEAL