

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CIVIL APPLICATION NO. 29 OF 2003
(ARISING FROM CIVIL SUIT NO. 242 OF 2002)

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DFCU BANK LTD.....APPLICANT

VERSUS

DR. ANN PERSIS NAKATE LUSEJJERE.....RESPONDENT

20 *Civil Application-stay of execution pending determination of an appeal-rule 1(3),42 and 43 of the court of appeal rules-grounds of application-high probability of success-suffer substantial loss if not granted-security for costs- Order 39 r 4 (3) of the civil procedure rules.*

RULING OF THE COURT:

30 This is an application by DFCU Bank Ltd, the applicant, under **rule 1 (3), 42 and 43 of the Court of Appeal Rules**, for stay of execution of the judgment of **Okumu Wengi J sitting in the High Court, Kampala in a H.C.C.S No. 242 of 2002** pending the determination of an appeal to this Court.

This was a case in which the respondent, as the mortgagor, sued the applicant who was in the process of selling her property to realize the security. The respondent had mortgaged the suit property to **Gold Trust Bank Ltd** which was later sold to the applicant. Under that mortgage the respondent agreed that a third party, (i.e. **A.V. Enterprises**) would, among other things, obtain a loan from **Gold Trust Bank Ltd** to the tune of Shs.80 million. After executing the mortgage and depositing her title to the suit property with
40 **Gold Trust Bank Ltd**, the respondent did not find out whether any money was disbursed

to **A.V. Enterprises** under the mortgage. Later, the applicant bought **Gold Trust Bank Ltd** and sought to exercise the right of sale of the suit premises under the mortgage. Therefore, it advertised the suit property for sale on a specified date.

The respondent, at first, tried to redeem the suit property by making certain concessions in repayment without correct information. However, because she could not fully understand whether **A.V. Enterprises** had truly taken a loan from the **Gold Trust Bank Ltd**, she decided to file **High Court Civil Suit No. 242 of 2002** against the applicant in a bid to have the applicant release the title to the suit premises. She contended that the applicant had no evidence to show that that it released any money to **A.V. Enterprises** under the mortgage.

The applicant denied the respondent's claim and alleged that the debt sought to be realized by the sale of her property was properly stated. Secondly, that she did accept to make repayments and went ahead to do so and having failed to complete the payments, she was liable to the applicant under the mortgage. The applicant counter-claimed for a sum of Shs.35 million which the applicant alleged was still owing under the mortgage.

At the trial two issues were framed. These were (a) whether the title of the respondent was held by the applicant for an advance to **A.V. Enterprises** and (b) remedies, if any. The learned trial judge found in favour of respondent namely: -

- (1) that there was no debt of Shs.35 million due under the mortgage which is the subject of the suit;
- (2) that the mortgage/surety should stand discharged from liability to the applicant and ordered the applicant to release the respondent's security and title to her.
- (3) that each party to bear its own costs.

The applicant was aggrieved by the court's decision and lodged a Notice of Appeal in this Court. It first filed *Misc. Application No. 78 of 2003* in the High Court for stay of execution which was dismissed by *Lugayizi J* on 24th March 2003.

The grounds of this application are: -

- (1) *that the appeal has a high probability of success;*
- (2) *that if a stay of execution is not granted the applicant will suffer substantial loss because its proprietary right over the suit property, as mortgagee, will be nullified and the success of the appeal will be rendered nugatory.*
- (3) *the substantive appeal revolves around the issue as to whether consideration was provided for the mortgage;*
- (4) *whether the trial judge erred in law when he ordered a return of the certificate of title and cancellation of the mortgage.*
- (5) *whether the respondent who is a retired civil servant and without any known assets can satisfy the counter-claim in the event of this Court allowing the appeal and the Counter-claim.*

The application is supported by the affidavit of *Joshua Ogwal* who is the legal officer of the applicant. It was opposed by the respondent. Briefly, her responses are: -

- (i) *that she is a registered proprietor of the suit property,*
- (ii) *that if the certificate of title is not released she would not be able to get and retain good tenants,*

- (iii) *that she is a retired Civil Servant and the rents from the suit property are her source of livelihood and that if a stay is granted she would suffer irreparable damage.*
- (iv) *that the suit property is worth about Shs.200 million which is far in excess of the Shs.35 million which the applicant is claiming,*
- (v) *that the applicant is a well to do bank with a profit of about Shs.8.8 billion for the year 2002 alone,*
- (vi) *that she also is the owner of a 10.67 acres of land comprised in LRV 2979 at Lubowa Zone, Seguku Parish, along Entebbe Road,*
- (vii) *that the applicant will not suffer any substantial loss if the application is refused,*
- (viii) *that the applicant's loss, if any, can easily be atoned by the payment of the Shs.35 million plus interest, and*
- (ix) *that a stay of execution will prejudice her proprietary rights in the suit property.*

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Mr. Adriko, who appeared for the applicant, referred to the case of *Kampala Bottles Ltd v Uganda Bottles Ltd, Civil Appeal No. 25 of 1995* where the Supreme Court stated the law on the issue and submitted that *Lugayizi J* did not follow the principles applicable which Court must follow when considering an application for stay of execution and prayed that the application be granted.

According to counsel, *Lugayizi J*, saw no merit in the application as there was no
30 likelihood of the appeal succeeding in this Court. The applicant's complaint is that *Lugayizi J* decided the case on wrong principles. The proper test, according to *Mr.*

Adriko, is whether the application for stay of execution meets the conditions stipulated in **Order 39 rule 4 (3) of the Civil Procedure Rules** and not whether the appeal is likely to succeed. The applicant has to establish: -

- (i) that a substantial loss may be suffered by the applicant if the application is not granted.
- (ii) that the application was made without unreasonable delay, and
- (iii) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding on him.

Mr. Nerima, learned counsel for the respondent, opposed the application on two grounds, namely: -

- (1) that the applicant has failed to prove that it would suffer substantial loss if the application is not granted. The applicant's counter-claim is for Shs.35 million. If the appeal succeeds, the respondent will be able to pay that money with interest as she has properties. There is no proof that she intends to sell those properties.
- (2) The second was balance of convenience. We think that the argument on this ground is misconceived as balance of convenience is not one of the principles on which an application for stay of execution is granted.

We wish to mention that an application to this Court for stay of execution under **rule 1 (3) and 5 (2) (b) of the Rules of this Court** after a similar application to the Court below has been refused is not in the nature of an appeal from the refusal of the Court below. The jurisdiction of this Court is concurrent with that of the Court below and an application to this Court is a fresh application.

We made no pronouncements on the correctness or otherwise of the findings of the learned trial judge. Indeed, it would not be proper for us to make any pronouncements that might prejudice the appeal. All we can say is that the issue whether or not the respondent owed the Shs.35 million at the date of the writ still remains to be determined on appeal.

It is the paramount duty of a Court to which an application for stay of execution pending an appeal is made is to see that appeal, if successful, is not rendered nugatory: See *Wilson v Church (1879) 12 Ch. D. 454*.

10 As we have pointed out above *Lugayizi J* did not bother to consider all the principles in *Order 39 rule 4 (3) of the C P R* as he saw no merit in the proposed appeal. Although, *Lugayizi J* attached much importance to the likelihood of the success of the appeal, in fairness to him, he also considered whether the applicant would suffer substantial loss if the application is not allowed. This is how he put it: -

"The applicant merely showed it appealed against the decision of the Court in the High Court Civil Suit No. 242 of 2002. It did not indicate even the chances it had for the success of that appeal (See Nganga v Kimani [1959] E.A. 69 and Iddi Heltani v Hamisi Binti Alhumani (1962) EA 761.)

20 *That aside, the applicant did not prove that if Court refused to grant an order for stay of execution and later on the applicant succeeded with the appeal the respondent would be unable to pay Shs.35 million it alleged that A.V. Enterprises took under the mortgage."*

The temporary stay was to enable the applicant to come to this Court and seek a longer stay. We do not see why the judge should trouble himself about the likelihood of the success of the appeal. Certainly, this factor should not be allowed to inference with the judge's decision whether or not to grant a stay of execution.

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The matter is clearly governed by **Order 39 r 4 (3) of the Civil Procedure Rules**. Under that provision the applicant must show: -

- (a) that substantial loss may result to the applicant unless the order for 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.

In our opinion, once the above three conditions are fulfilled by the applicant, then the order for stay of execution ought to be granted, regardless whether the appeal will fail or
10 succeed. Judgment in this case was delivered on 20/01/2003. Notice of Appeal was filed on 04/02/2003 and was within time in accordance with rule 75. This application was brought on 31/3/2003. In our opinion, there has not been any unreasonable delay.

We agree with **Lugayizi J** that the applicant failed to prove that it would suffer substantial loss if the application is refused. The claim of the applicant, in the counter-claim, is shs.35 million. The respondent has shown that she has landed properties far in excess of the Shs.35 million the applicant is claiming. In any event, the applicant has failed to show that a mere Shs.35 million would cripple a bank that boast of a net profit of Shs.8.8 billion in the year 2002 alone. Though, we agree that if it surrenders the title deed, its
20 proprietary rights in the property will be lost. That right is only a security for due performance of the obligation under the mortgage. That right cannot be said to be substantial as against the rights of the respondent, who is a registered proprietor of the suit property. It therefore appears to us that the applicant would not suffer substantial loss if the application is refused.

That leaves only the matter of security for costs. Under **Order 39 r 4 (3) of CPR** an application for stay of execution pending an appeal must be accompanied by payment of security for costs. The applicant has not complied with that provision. The reason for the failure to deposit security for costs is that none was awarded by the High Court.

We wish to point out that this Court does not operate under the **Civil Procedure Rules** in question. An application for stay of execution in this Court is governed by rule 5 (2) (b) of the Rules of this Court. That rule empowers this Court to stay execution pending appeals in civil proceedings on such terms as this Court may think fit. There is of course, also a mandatory provision in rule 104 for the payment of a fixed sum as security for costs of the appeal. There is no legal requirement, in this Court, that further security for costs must be paid at time the appeal or application is lodged. Whether the trial Court awarded costs does not relieve the applicant of his mandatory obligation to pay a fixed sum as security for costs of the appeal as is required by rule 104. The applicant did not
10 comply with that mandatory provision.

For the above reasons, we find no merit in the application.

Before we conclude this matter, we think the following statement by **Akuto-Addo JSC** and former Chief Justice of Ghana in **Joseph v Jebeile (1963) 1 G L R 387** will serve as a useful guide to judges when considering an application for stay of execution pending appeal. The Chief Justice said: -

20 *"While we do not wish to say anything that may be interpreted as a fetter on the exercise of the discretion of a trial judge when he considers an application for stay of execution pending appeal, we think it necessary in the interest of justice, to say generally that when such an application is considered in a case involving, inter alia, the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had had to pay up or surrender some legal right only to find himself successful on appeal. In this respect it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of he would-be appellant's chances on appeal, if the position (it is not of course suggested that that is the position in the case before us) is that the victorious party is unlikely to be able to refund the*
30 *amount paid to him, or the defeated party to be restored to the status quo ante, in the event of a successful appeal (and it should not be difficult to determine the likelihood*

of such an event), then it would be palpably unjust to refuse stay of execution, or, when stay of execution is refused, not to order the judgment-creditor to give good, substantial and realizable security for the refund of the money involved.

Generally speaking it is not our view that the policy of the law in this country should be against staying execution pending appeal especially where large sums of money are involved, and we would urge that when execution is stayed it should, where the circumstances permit, be on the condition that the judgment-debtor pay into court the amount of money involved, or when refused, on the condition that the judgment-creditor give security as aforesaid and approved by the judge.

Any situation created by a judicial act, done either inadvertently or callously, which makes it impossible for a successful appellant to recover money paid, or any interest in property or other legal rights surrendered, under a judgment vacated on appeal does a disservice to the course of justice, if only because it undermines public confidence in the administration of justice."

We agree with the above statement and commend it to Judges.

The application, is in the result, dismissed. The Bank is ordered to release the title of the suit property to the respondent. It is also ordered that pending the disposal of the appeal, the respondent should not sell or alienate the suit property and the land comprised in LRV 2979 at Lubowa Zone, Seguku Parish, along Entebbe Road.

Dated at Kampala this ...10thday of ...July.....2003.

A.E.N. Mpagi-Bahigeine
Justice of Appeal.

J.P. Berko
Justice of Appeal.

C.N.B. Kitumba
Justice of Appeal.