

## Ruling

**Representation:**

Mr. Timothy Masembe Kanyerezi of MMAKS Advocates represented the 1<sup>st</sup> Applicant; Mr. Edwin Karugire of M/S Kiwanuka and Karugire Advocates represented the 2<sup>nd</sup> Applicant and Mr. Nestor Byamugisha of Barya, Byamugisha & Co. Advocates was Counsel for the Respondent.

This ruling was based on two applications brought by Notice of Motion under Rules 2 (2); 6(2) (b) and 43(1) under 44 (1) of Court Appeal Rules.

**Back ground**

In Civil Appeal No. 071 of 2009, Belex Tours and Travel Ltd successfully appealed against a High Court Judgment which was in favour of Crane Bank and Ms. Fang Min, the respondents in the applications before this Court.

The Court of Appeal issued a decree in favour of Belex Tours and Travel Ltd as follows:

- a. The Registrar of Titles shall forthwith cancel the registration of the 2<sup>nd</sup> respondent Fang Min as proprietor of Leasehold register Volume 2490 Folio 4 Plot 9 Ssezibwa Road, Kampala and reinstate the appellant Belex Tours and Travel Ltd. as the proprietor.
- b. The Registrar of Titles Lands cancel all encumbrances if any, now existing on the title for leasehold Register Volume 2490 Folio 4 Plot 9 Ssezibwa Road, Kampala.
- c. The 2<sup>nd</sup> respondent Fang Min immediately hands over vacant possession of the property comprised in Leasehold Register Volume 2490 Plot Ssezibwa Road, Kampala to the appellant Belex Tours and Travel Ltd or in the event that the

time of delivering this judgment the said property has been transferred to an innocent purchaser for value without notice, the 2<sup>nd</sup> respondent shall pay to the appellant US \$745,000 (Seven Forty Five thousand) or its equivalent in Uganda Shillings with interest at 11% per annum from the date of the judgment till payment in full.

- d. The 1<sup>st</sup> respondent Crane Ltd. and 2<sup>nd</sup> respondent Fang Min jointly and/or severally pay to the appellant Shs. 194,313,000/= ( one hundred ninety four million three hundred thirteen only) with interest at 17% per annum from 15<sup>th</sup> May, 1999 until the date of this judgment and thereafter at 8% per annum from date of this judgment till payment in full.
- e. The 1<sup>st</sup> respondent Crane Bank Ltd. pays to the appellant Belex Tours and Travel Ltd. US \$5,800 (five thousand eight hundred only) with interest at 6% per annum from 15<sup>th</sup> May, 1999 till payment in full.
- f. The 1<sup>st</sup> respondent Crane Bank Ltd and the 2<sup>nd</sup> respondent Fang Min pay to the appellant Belex Tours and Travel Ltd. general damages for conversion of moveable property amounting to Shs. 20,000,000/= (twenty million)with interest at court rate from date of judgment till payment in full.
- g. The 1<sup>st</sup> respondent Crane Bank Ltd. pays to the appellant Belex Tours and Travel Ltd general damages for loss of business and loss of use of its property from 15<sup>th</sup> May, 1999 to date equivalent to US\$ 704,829 (seven hundred four thousand eight hundred twenty nine) which was the outstanding loan at 15<sup>th</sup> May, 1999 together with interest at the commercial leading rate from that date of this judgment which general damages shall be such that they completely offset the loan.
- h. The 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and/or severally pay costs of this court and in the court below.

On 25 Oct 2013 pursuant to the said Judgment and Decree Ms. Fang Min filed a Notice of Appeal and a letter requesting for a typed copy of the record of proceedings.

On 28 Oct 2013 Ms. Fang filed an application for stay of execution of the judgment and orders of the Court of Appeal pending the determination of the appeal by the Supreme Court.

On 28 October, Ms. Fang Min filed an application for an interim order to stay the Execution of the Judgment and Orders of the Court of Appeal pending the determination of the main application for stay of execution.

On 28<sup>th</sup> Oct 2013, Crane Bank Limited filed a Notice of Appeal and a letter requesting for a typed copy of the record of proceedings.

On 28 Oct Crane Bank filed an application for stay of execution of the decree pending hearing of the Appeal by the Supreme Court.

On 28 October 2013, Crane Bank filed an application for an application for an interim order to stay Execution of the judgment and Orders of the Court Appeal pending the determination of the main application for stay of execution.

The two applications were listed before me as a single Justice and at the beginning of the hearing, counsel for the 1<sup>st</sup> respondent submitted that although the applications were filed separately, (this arising out of the fact that each party had its own counsel), the applications arise out of the same judgment. He sought the leave of court to have the applications consolidated for better management of the case since in his expectation the same arguments would be raised in both applications. Counsel for the respondent submitted that consolidation was not

called for because the respondent did not intend to oppose the application for an interim order by the Crane Bank. He conceded that the interim Order sought for by the Crane Bank could be issued. He further submitted that even in relation to Fang Min's application the respondent would only oppose part of the application. Court ruled that since no injustice would be caused by the consolidation, the applications were deemed consolidated – this was to ensure that court would also be in position to make orders in reference to the application by the Crane Bank which was already before Court, albeit conceded to by the respondent.

The grounds on which each application was based are contained in the separate Notice of Motion by each party. But since counsel for the respondent submitted that they would only oppose stay of one particular part of the Decree against Fang Min, I reproduce the relevant order of the Court Decree here below:

*(c) The 2<sup>nd</sup> respondent Fang Min immediately hands over vacant possession of the property comprised in leasehold Register Volume 2490 Folio 4 plot 9 Ssezibwa Road, Kampala to the appellant Belex Tours and Travel Ltd or in the event that at the time of delivering this judgment the said property has been transferred to an innocent purchase for value without notice the 2<sup>nd</sup> respondent shall pay to the appellant US\$ 745,000 (Seven Forty Five thousand) or its equivalent in Uganda shillings with interest at 11% per annum from 15<sup>th</sup> May, 1999 from the date of this judgment until payment in full.*

In support of the application for the interim order Counsel for the 2<sup>nd</sup> applicant relied on an affidavit sworn by Ms. Fang Min in support of the motion filed on the 28<sup>th</sup> October in which it was submitted inter alia that:

- If the Decree of the Court of Appeal is executed, the Applicant's appeal to the Supreme Court will be rendered nugatory.
- If Application for the order of interim stay is not granted by this Honorable court, the Applicant was likely to suffer irreparable injury which could not be compensated in damages.
- The Applicant was willing to undertake not to transfer the suits Property LRV 2490 Folio 4 Plot 9 Ssezibwa Road until final disposal of the appeal in the Supreme Court
- The Applicant was ready and willing to deposit security in this Honorable Court for due performance of the decree and orders as may ultimately be binding on the Applicant.

Counsel also relied on a supplementary Affidavit by Ms. Fang Min in which it was pleaded that:

- On the 29<sup>th</sup> of October 2013 at 7.00 am, a group of bailiffs came to the suit premises Fang Fang Hotel, Plot 9 Ssezibwa Road, Kampala where they served me with a warrant to give vacant possession to the Respondent herein.
- **THAT** the said Bailiffs attempted to lock the gates to the premises thereby denying entry and exit to the guests in the hotel and were behaving in a violent manner.

- **THAT** the Police led by the Commander Kampala Metropolitan came to our aid and immediately stopped the unruly bailiffs pending verification of the order and compliance with execution guidelines.
- **THAT** I also through my lawyers applied to the Acting Head of the Court to stay execution of the warrant until this application is heard which application was granted. A copy of the letter and warrant are attached hereto as A1 and A2.
- **THAT** I remain in full possession of the suit premises and together with my staff led by my hotel manager Mr. GUXING YONG we are running the hotel.
- **THAT** there is therefore an imminent threat of execution before the main application of stay can be heard.

In reply counsel for the respondent submitted that as was indicated in the affidavit sworn by Ms. Trust Masters Court Bailiffs and Auctioneers Ltd on 29<sup>th</sup> October 2013 and filed in Court, execution of the Decree ordering Fang Min to handover vacant possession of the property had already been carried out and a return of the warrant giving vacant possession of the property had already been filed in Court on 29<sup>th</sup> October 2013. He thus argued that in the circumstances the application had abated.

In support of his case, he referred me to the case of *The Administrator General versus National Social Security Fund, Basaija David Kisembo Fulugence and Mungereza*, Civil Application No 2 of 2009, which I will discuss later.

Counsel Byamugisha further submitted that as indicated in the affidavit of the Bailiff, by the time the administrative stay of execution given by the Acting Head of Court referred to in the applicant's Supplementary Affidavit was served on the

bailiff, the bailiff was already in possession of the property as Decreed by the Court of Appeal.

He argued that consequently, if court went on to issue the order sought, after execution had taken place, such action would be tantamount to a single Justice setting aside the Judgment of this Court by a full bench.

Counsel Byamugisha also objected to the fact that whereas the affidavit sworn by Ms. Fang in support of the Notice of Motion filed on 28 October 2013 did not aver that there was imminent danger that execution of the Decree would occur before the hearing of the Decree, the applicant introduced the pleading that there was imminent threat of execution in a supplementary affidavit.

He argued that this was an indication that this further pleading was an afterthought after Fang Min had learnt that the bailiff had gone ahead to take possession of the property.

In reply to the fact that it is only in the applicant's supplementary Affidavit that imminent threat of execution was pleaded, counsel Karugire argued that the relevance of a particular pleading depends on the prevailing circumstances.

Whereas at the time of filing the Notice of Motion there was no evidence that execution of the Decree was imminent, circumstances had since changed and when the bailiff moved to carry out the execution, albeit aware that the applicant had filed an application for stay of execution, it became necessary for the applicant to bring to the notice of Court, the changed circumstances. Counsel argued further that he was not aware of any law that limited the number of affidavits that an applicant could file in support of a Notice of Motion.

In reply to the submission that the present application had already been overtaken by events since execution of the warrant had already been carried out, Mr.



Karugire submitted that whereas the bailiffs had served Fang Min with a warrant to give vacant possession to the respondent, the exercise had been halted by the Police led by the Commander Kampala Metropolitan who immediately stopped the bailiffs pending verification of the order and compliance with execution guidelines. Furthermore the Acting Head of the Court had given administrative orders to stay execution of the warrant until the application of the interim order could be heard by this court today (29<sup>th</sup> 2013). Mr. Karugire referred court to a copy of the letter from the head of Court to this effect.

He contended that as indicated in the pleadings of Ms. Fang Min in the supplementary affidavit, the applicant was still in full possession of the suit premises and continued to run the hotel. Further still, it was his contention that what had been decreed by court giving vacant possession of the properties to the respondent and not handing over a running hotel business. In these premises execution had not taken place as was being argued by counsel for the respondent.

Mr. Karugire referred me to the case of **HWANG SUNG INDUSTRIES Ltd Vs. TAJDIN HUSSEIN and others; Civil Application No. 18 of 2008** in which Okello JSC sitting as a single Justice dealt with an application for an interim order for stay of execution.

Because of the importance of the cited case in relation to the case before me, I will set out the case in great detail below:

The applicant (**HWANG SUNG INDUSTRIES Ltd**) had successfully sued the respondents in a High Court case for breach of contract. On appeal to the Court of appeal, the respondents were successful.

The applicant, who was dissatisfied with the Court of Appeal, appealed to the Supreme Court.

Anxious to reap the fruits of their success in the Court of Appeal, the respondents applied for execution of the decree of the Court of Appeal. The applicant who got wind of that application, applied in the Supreme Court for an order of stay of execution of the decree of the Court of Appeal, pending the disposal of his appeal. He also filed the instant application for interim order for stay in order to preserve the status quo of the subject matter of dispute pending disposal of the substantive application for stay of execution in the Supreme Court.

In the meantime, the Registrar of the Court of Appeal, acting on an application by the respondents, issued warrant of attachment and sale of the applicant's property in execution, when the applicant failed to respond to "Notice to show cause" issued under 022 r 39 of the Supreme Court Procedure Rules. On receipt of the warrant of attachment and sale in execution, the Court Bailiff proceeded to attach the plaintiff's property.

Presenting the applicant's case, counsel for the applicant sought the court's interim intervention to preserve the status quo pending the disposal of the main application for stay of execution now pending in the court. He acknowledged that attachment of the applicant's property

in execution of the decree had already been effected but argued that the execution was not yet complete since sale of the attached property was not complete.

Counsel for the respondent opposed the application on a number of grounds, but what is relevant for the present case was the argument that the application had been overtaken by event since attachment of the applicant's property in execution of the decree had already altered the position. Learned counsel in that case argued that to grant the application in such circumstances would be to reverse rather than to maintain the status quo. She prayed that the application be dismissed.

Okello JSC relied on rule 2(2) of the Rules of the court which preserve the inherent power of the court to make any orders to achieve the end of justice or to prevent abuse of its process. He ruled that the justice of the case required that the main application for stay of execution pending before the court be heard before the execution to avoid the main application being rendered nugatory.

In response to the submission that the application had been overtaken by events since attachment in execution had already been effected, Okello JSC stated that although there was no dispute about the attachment having been effected in execution of the decree in question, court accepted the submission of counsel for

the applicant that the attachment alone did not complete the execution. In an execution by attachment and Sale, both components must be completed in order to complete the execution.

I find a lot of similarity between the **HWANG SUNG INDUSTRIES Ltd** case and the case before me. In the case before me the bailiff served Fang Min with a warrant to give vacant possession of the property to the respondent. The bailiff even locked the gates to the premises. However before the exercise was completed, it was halted. The property of the applicant was still on the premises at the time of hearing this application and the business of running the hotel by the applicant had not been ended. Indeed as argued by counsel Karugire submitted the Court of Appeal Decree had not ordered for handing over the hotel business as a going concern to the respondent but vacant possession. What had been obtained by the bailiff was not vacant possession of the property and thus execution of the order not been completed. Like in the **HWANG SUNG INDUSTRIES** case, not all the components of the order had been completed.

I now return to the case cited in support of the respondent's submissions: *The Administrator General vs. NSSF and 2 others; Civil Application No 2 of 2009*, which Mr. Byamugisha, counsel for the respondent referred this court to. The application was before Tsekooko JSC sitting as a Single Justice.

The brief facts of the case were that The Administrator General (the applicant) instituted an application in the Supreme Court seeking for an interim order to stay execution of what a High Court Decree, pending the hearing of a main application

by which the applicant sought for a final order of stay of execution of the same decree.

The notice sets out some ten grounds in support at the application and was supported by several affidavits. In opposition to the application were three affidavits; the first by an internal Legal Counsel for the respondent, the second affidavit was sworn by the third respondent and the third affidavit was by the second affidavit in which he stated that he purchased the suit property in September 2006 and was registered as proprietor on 5/9/2006 and that eviction the occupants of the suit property had been effected 4 days before the hearing of the application for the interim order. He averred that by the time of hearing the application he had been in possession of the property for 4 days. Finally Festus Kateregga swore his affidavit to the effect that as Court Bailiff, he carried out the eviction (4 days before the hearing of the application) and handed the suit property to the 3<sup>rd</sup> respondent who has acknowledged this in his own affidavit.

It appears that the sale of the property to the third respondent had been challenged and an application had been instituted in the High Court from whose decision in that application, an appeal was apparently instituted in the Court of Appeal. That appeal was still pending at the hearing of *Civil Application No 2 of 2009* by Tsekooko JSC. But the applicant had also instituted an application in the same Court (Court of Appeal) seeking orders to stay execution of the decree in the High Court. According to the ruling of the Court of Appeal, in that application, the applicant sought an order “to **restrain the 3rd respondent** from disposing of or alienating the property.....until the appeal is heard”

The first respondent opposed the application in the Court of Appeal principally on the basis that the appeal in that court was unlikely to succeed as its foundation was bad in law. The Court of Appeal dismissed the application and declined to grant stay of execution. The applicant lodged a notice of appeal intending to appeal against that ruling. Consequently an application for stay was filed in the Supreme Court.

In the said Supreme Court case, although Tsekooko JSC stated that an application for stay of execution is automatic provided a proper Notice of Appeal is in existence, he declined to issue an interim order to stay execution of the High Court Decree while awaiting hearing of the main application because:

**The main reason why the applicant sought for an interim order was to prevent the 3<sup>rd</sup> respondent, Fulgence Mungereza from evicting the applicant from the suit property the subject of these proceedings. Unfortunately eviction was carried out ...**

In other words, Tsekooko JSC declined to grant the stay on the ground that the Decree by the High Court had already been executed - eviction of occupants from the suit property had been completed. The application had thus abated.

*In my view the case of The Administrator General vs. NSSF and 2 others can be distinguished from the facts of the application before me. In the application for an Interim Order before me, eviction of Fang Min from the premises had not been*

completed, it had been halted and the applicants were still in possession of the property. I believe that what occurred was but an attempt to execute the relevant part of the decree.

Therefore this application has not been overtaken by event.

### **Resolution of Court**

For an application for an interim order of stay to succeed, it suffices to show the following:

1. That the applicants have lodged before this court a proper application for an interim order for stay
2. That there is a substantive application to stay execution which is still pending disposal.
3. There is a serious threat of execution before determination of the pending substantive application. The serious threat of execution must be proved by the applicants

Having studied the pleadings and having also listened to the submissions of the two counsel, I am aware of the following;

- i) Judgment in Civil Appeal No.071 of 2009 was delivered against Crane Bank and Ms. Fang Min in favor of the Respondent on the 24<sup>th</sup> October 2013;

- ii) The applicants are appealing the said Judgment and have filed Notices of Appeal and letters requesting for the typed proceedings. These are on record.
- iii) The applicants have also filed main applications for stay of execution and the applications are yet to be fixed for hearing.
- iv) There is an imminent danger of execution against the applicant before disposal of the main application to stay execution. A Decree has already been extracted and a Warrant of Execution has been given. As a matter of fact an attempt was made at executing the Decree.

Denial of the interim order would result into execution against the applicant before the disposal of the main application for stay of execution and would thus render the substantive application nugatory.

I have taken into consideration the substantial investment involved and nature of the business of the M/S Fang Min (a running a hotel) and opine that in light of this, indeed if execution was to occur before determination of the main application for stay is determined by the full bench, the enterprise is likely to suffer irreparable harm and thus render the application nugatory.

At this stage of entertaining the application for the interim order, I need **not** pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application. Neither is it necessary to delve in detail in matters necessary in deciding whether or not the appeal is likely to succeed.

My ruling is also guided by the commitment of the applicant Ms. FANG MIN not to transfer the Suit Property until final disposal of the Appeal in the Supreme Court and commitment to deposit security in this Court for due performance of the decree



and orders as may ultimately be binding on the Applicant. In other words the applicant is committing to preserve the property in issue.

For the above reasons and in the interest of justice I allow the applications and hereby order that:

1. Execution of the Judgment and orders of the Court of Appeal in Civil Appeal No.071 of 2009 be stayed pending the determination of Court of Appeal Miscellaneous Application No. 344 of 2013, the main application for stay of execution.
2. The certificate of title for the suit property comprised in LRV 2490 Folio 4 Plot 9 Ssezibwa Road be deposited in Court pending hearing and determination of the main application.
3. The cost of this application shall be in the cause.

Dated at Kampala this ...28th... day of October..... 2013.

Hon Justice Professor Lillian Tibatemwa- Ekirikubinza

**JUSTICE OF APPEAL**