

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 20 OF 2015

5 **CONFOAM UGANDA LTD.....APPLICANT**
VERSUS
MEGHA INDUSTRIES (U) LTD.....RESPONDENT

CORAM: HON. MR. JUSTICE RUBBY AWERI -OPIO, JA

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HON. MR. JUSTICE KENNETH KAKURU, JA

HON. LADY JUSTICE PROF.LILLIAN E.TIBATEMWA, JA

RULING OF THE COURT

15 This is an application for stay of execution of the order of Hon Lady Justice Flavia
Anglin Senoga J dated 27th November 2014 in the High Court Commercial Division
Miscellaneous Cause No. 21 of 2014.

The application is brought under **Rule 6(2) b** of the Rules of this court and is supported by
20 the affidavit of one Kajubi Muhamad Ali.

It seeks the following orders.

- 25 ***1. An order for stay of execution of the order for payment of exemplary damages of UGX
300,000,000/= and costs to the Respondent until determination of the intended Appeal.***
- 2. An order suspending the obligation to pay a fine of UGX 100,000,000/= to the Court
until determination of the intended Appeal.***
- 3. Costs of the Application be provided.***

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The respondent filed an affidavit in reply opposing the application. When the matter came up for hearing the applicant was represented by **Mr. Joshua Byabashaija** while the respondent was represented by **Mr. Owen Murangira** together with **Mr. Friday Kagoro**.

5 Both Mr. Byabashaija and Mr. Murangira made lengthy submissions for and against the application. We shall not delve into the details of those submissions because in the end the respondent was inclined to concede to a conditional grant of the application. The applicant was also willing to deposit shs. 80,000,000/= in court as security for due performance of the order.

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The brief background to this application as far as we could ascertain from the court record is as follows:-

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Both the applicant and the respondent are engaged in the business of manufacturing foam mattresses in Uganda.

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The respondent appears to have registered a trade mark under which its products, specifically the mattress covers, are made and sold. It is the design cover that distinguishes products of different manufacturers. Sometime in April 2011 the applicant started selling its own mattresses with a cover design which was the same or similar to that of the respondent.

The respondent sued the applicant seeking among others an order of permanent injunction restraining the applicant from infringing it's Trademark and for passing off its goods.

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The applicant conceded to that suit in the result that a consent judgment was entered against the applicant on the following terms:-

i) A permanent injunction issues restraining the defendant, its agents, servants or otherwise howsoever from passing off its goods as those of plaintiff.

ii) ***A permanent injunction issues restraining the defendant, its agents, servants or otherwise howsoever from procuring and / or manufacturing mattresses with the infringing mattress cover design which is the subject matter of this suit.***

5 iii) ***The defendant pays UGX 5,000,000/= (Uganda shillings five million only) being nominal damages for infringing the plaintiff's mattress cover design.***

iv) ***The defendant pays UGX 5,000,000/= (Uganda shillings five million only) as costs of suit.***

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v) ***All criminal proceedings earlier commenced by the plaintiff against the defendant and / or its officers or employees are hereby dropped.***

The applicant appears to have applied for its own Trademark in respect of mattress covers. That Trademark was issued on 14th October 2013. Thereafter it claims to have started producing mattress covers under its "Own new" trademark. This is contested by the respondent who contended that the "new" trademark is in fact a replica of its own and that the applicant continues to manufacture and market its products by infringing the respondent's Trademark.

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The respondent filed *Miscellaneous Application No. 125 of 2014* seeking to enforce the consent judgment. The applicant on its part filed *Civil Suit No. 2 of 2014* at the High Court in Jinja seeking to restrain the respondent from interfering with its business. The issue for determination in that suit appears to be whether or not the applicant is infringing the respondent's Trade Mark. The matter is still pending. The respondent then filed *Miscellaneous Cause No. 21 of 2014* at the *Commercial Court* contending that the applicant was in contempt of court having violated the consent decree in *Civil Suit No. 269 of 2011*.

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The court made the following orders:-

1. *A suspended sentence of six months committal is to be meted out to the Directors of the Respondent Company, if the acts that were forbidden by court in the consent order persist.*
2. *Exemplary damages of shs. 300,000,000/- are awarded to the Applicant Company with payment of interest at court rate from date of this ruling till payment in full.*
3. *The sum of shs. 100,000,000/- is awarded against the Respondent as a penalty for contempt of court orders in Civil Suit 269/2011. The sum is to be deposited in court.*
4. *The mattresses with the infringing cover design shall be removed from the market for destruction with the assistance of police following the procedures set out in the Trade Marks Act, upon failure of which a writ of sequestration will issue.*
5. *Taxed cost of the application are also granted to the Applicant.*

The applicant being dissatisfied with said order sought leave before the same Court to appeal. Leave was not granted. The applicant nonetheless went ahead and filed a notice of appeal in this Court and subsequently the appeal has also been filed.

The applicant also applied for an interim order of stay of execution of the order of the High Court referred to above. The order was granted by a single Justice of this Court. The applicant now seeking a substantial order staying the execution of the High Court order in *Miscellaneous Cause No. 21 of 2014.*

We have listened to the submissions of both counsel and we have also perused the court record. We are mindful of the law as set out in the authorities cited to us and other decisions of this Court and the Supreme Court. *See:- Kyambogo University Versus Prof. Isaiah Omolo Ndiege Court of Appeal (Civil Application No. 341 Of 2013) and P. K Sengendo Versus Busulwa Lawrence & Male Abdu Court of Appeal (Civil Application No. 207 of 2014.)*

Before granting the order sought we must be satisfied that there is a pending appeal and that it has a likelihood of success. The issue as to whether the applicant has a right of appeal to this Court from the order appealed from was raised by the respondent. Since the respondent now concedes that this application be granted conditionally, we shall leave that matter for
5 determination at the hearing of the appeal itself.

Contempt of court orders by parties is a very serious matter and as such it attracts severe sanctions. This Court takes it seriously. But the gravity of the subject matter does not in itself take away the applicant's right of appeal.

10 On the other hand this Court cannot permit parties to violate orders of courts of law with impunity and to use court process to evade sanctions.

Taking into account all the circumstances of this case and the fact that the respondent concedes to the application *albeit* conditionally we make the following orders:-

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(1) That the order of the High Court in High Court Miscellaneous Application No. 21 of 2014 is hereby stayed pending the determination of the appeal herein, on the following terms:-

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i) *That the applicant shall deposit in this court as security for due performance of the said order of shs.150,000,000/= by way of Bank draft or transfer as the Registrar of this court shall determine within 7 days of this order.*

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ii) *The applicant shall cease forthwith to manufacture, sell or otherwise distribute its products using the cover design the subject matter of consent judgment in High Court Civil Suit No. 269 of 2011.*

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iii) *The applicant shall cease to manufacture, sell distribute its products under the disputed Trademark No. 47874 issued on 18th July 2013.*

iv) *The applicant shall only manufacture, sell and distribute its products using a design cover which has only one plain colour and its company logo or name until the appeal herein is determined or until further orders of this Court.*

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(2) The costs of this application shall abide the result of the appeal.

Dated at Kampala this 13th day of March 2015.

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HON. MR. JUSTICE RUBBY AWERI OPIO
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE PROF.LILLIAN E.TIBATEMWA
JUSTICE OF APPEAL

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