

SSEMAKULA AUGUSTINE.....APPLICANT

VERSUS

1.ATTORNEY GENERAL

2.DISCIPLINARY COMMITTEE OF THE LAW

COUNCIL.....

.....RESPONDENT

BEFORE: HON. JUSTICE KENNETH KAKURU, JA HON JUSTICE
HELLEN OBURA, JA HON.JUSTICE CHEBORION BARISHAKI,
JA

RULING

This is an application for stay of execution brought under the provisions of Rules 2(2), 6(2), 40, 41(1) & 42 of the Judicature (Court of Appeal Rules) Directions, Section 98 of the Civil Procedure Act Cap 71, and Section 33 of the Judicature Act.

Background to the application:

The applicant, who is an Advocate of the High Court of Uganda, represented the former workers of the Uganda Dairy Corporation in High Court Civil Suits Nos. 614/2003, 814/2003, 800/2003 and 883/2004 to recover their terminal benefits and milk allowances. Being dissatisfied with the way the applicant carried out their instructions, a section of the former workers filed complaints of professional misconduct with the Law Council (2nd respondent) against him. The 2nd respondent conducted a hearing and delivered a ruling where the applicant was suspended from legal practice for a period of 2 years, ordered to refund the complainants monies and to pay costs to the complainants and the 2nd respondent herein.

The applicant appealed against the decision of the 2nd respondent to the High Court, vide Civil Appeal No.0053 of 2012, but the appeal was dismissed for having been filed out of the stipulated time. The applicant then made an application for judicial review in the High Court, against the decision of the 2nd respondent on grounds of illegality, irrationality and procedural impropriety. However, the court made a finding that the proceedings and ruling of the 2nd respondent were not **ultra vires**, not illegal, had no procedural impropriety and were not in abuse of the laws of natural justice.

Subsequently, the applicant filed **Constitutional Petition No.05 of 2014** in this Court on allegations that he had suffered and is likely to continue to suffer infringement of his fundamental rights as a result of the 2nd respondent's decision, and also challenging the constitutionality of some Sections of the **Advocates Act, Cap 267**.

The applicant then filed this application for stay of execution of the orders of the 2nd respondent. The grounds of the application are contained in the notice of motion and the affidavits sworn by the applicant. The grounds are briefly as follows;

1. The applicant filed Constitutional Petition No.5 of 2014.

2. There is an eminent threat of execution of the orders of the 2nd respondent as well as the orders of the High Court in Civil Suit No.53 of 2012.
3. The applicant's Constitutional Petition which has high chances of success will be rendered nugatory if an order for stay of execution is not granted.
4. It is just, equitable and in the interest of justice that the application is granted.

On the other hand, the 1st respondent opposed the application and filed an affidavit in reply dated 4th December, 2015. The grounds in opposition of the application are briefly as follows;

1. The applicant was accorded a fair hearing by the 2nd respondent; he was present throughout the hearings, he had an opportunity to defend himself and was represented by Counsel.
2. The 2nd respondent acted within the powers granted to it under the law and followed the appropriate procedures prescribed under the Advocates Act.
3. The applicants Constitutional Petition is misconceived, raises no issues for constitutional interpretation and is barred by the doctrine of **res judicata** as it raises issues that were dealt with by the Constitutional Court in **Vicent L .Okucha Emoru v Attorney General, Constitutional Petition No. 5 o f1998**.
4. It is fair and just that the orders of the Disciplinary Committee of the Law Council are implemented because the former workers of the Dairy Corporation who were denied their terminal benefits as a result of the applicant's endless actions and applications have to-date not received their entitlements.
5. The balance of convenience favours the 1st respondent and the damage/injury the applicant is likely to suffer can easily be compensated by way of damages.

At the hearing of this application, Counsel for the applicant submitted that if this application was not granted, the applicant's Petition would be rendered nugatory and it would cause hardship to the applicant because UGX 6,000,000,000/= is a colossal amount of money. Further, that the 2nd respondent had, at the hearing, rejected the applicant's explanation that Uganda Revenue Authority had seized and taken part of the money from the applicant's account. It was Counsel's submission that the balance of convenience favours the granting of a stay of execution.

On the other hand, Counsel for the respondents opposed the application and submitted that the application was misconceived and was part of the applicant's ploy to delay execution.

Counsel for the respondents further submitted that the provisions of the **Advocates Act**, sought to be declared unconstitutional had already been declared to be Constitutional by this Court in **Vicent L'Okucha Emoru v Attorney General (Supra)**. Therefore, the applicant's Constitutional Petition could not stand and this application could not stand as well.

Counsel for the respondents relied on **Kyambogo University v Omolo Ndiege, CA Civil Application No.341 of 2013**, for the conditions upon which a stay of execution may be granted. He contended that in the present case, there was no **prima facie case** and the applicant would not suffer any

Irreparable loss if the application was not granted.

At the conclusion of the submissions of Counsel, this Court required the applicant to file evidence indicating the amount of money that had allegedly been seized and taken by Uganda Revenue Authority from his account. The applicant filed a supplementary affidavit dated **9th December, 2015**,

wherein he stated that upon paying out two third of the money to his clients, URA Issued an Agency Notice against his account and took the

remaining money from there. He made reference to the evidence of Mr. Rutemberwa Justus, an accountant for the former diary workers who had testified that

the claim from URA was UGX 1,643,627,285/= while the claim from the applicant was UGX 2,787,786,266/=.

In reply, an affidavit was sworn on behalf of the respondents by Bafirawala Elisha, a Senior State Attorney in the Attorney General's Chambers. He stated that the applicant had instituted legal proceedings before the Commercial Court against Uganda Revenue Authority to recover the money that was allegedly seized from his account. Therefore, if the applicant was facing execution based on an issue being challenged before the Commercial Court, then the proper course of action was to file and obtain an injunctive relief from the Commercial Court.

We have considered the pleadings as well as the submissions of Counsel in support of and against this application.

With regard to the issue of the amount allegedly seized from the applicant's account by Uganda Revenue Authority, we did not find the evidence given by the applicant helpful to this Court. While the Agency Notice from URA indicated the amount to be seized as UGX 3,064,555,591/=, the applicant does not indicate the exact amount that was actually taken from his account on the basis of that notice. He merely makes reference to the evidence of Mr. Rutemberwa which indicates different amounts than those indicated in the Agency Notice. It would have been prudent and of more help to this Court if the applicant had extracted financial statements from his bank so that we could get a clear picture of how much was deducted.

The above notwithstanding, we shall go ahead to consider the main grounds raised by the applicant in support of this application. The power of this Court to grant stay of execution is based on **rule 6(b)** of the rules of this Court. It is stated that where a notice of appeal has been lodged, this Court may order a stay of execution on such terms as the Court may think just.

Stay of execution is a discretionary power exercised by Court based on the circumstances of each case. In National Corporation versus Mukisa Foods Misc. Application No. 7 of 1998 this Court held that; "the Court has power in its discretion to grant a stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo."

Similarly, in Kyambogo University versus Prof. Isaiah Omoto Ndiege Court of Appeal Civil Application No. 341 of 2013 the Court noted thus:

"In my view the law recognizes that not all orders or decrees appeal from have to be stayed pending appeal. It also recognizes a fact that an appeal may be determined without the court having to grant a stay of execution. However, court may stay execution where the circumstances of the case justify such a stay. It is therefore incumbent upon the applicant in every application to satisfy court that grounds exist for grant of a stay of execution. The assumption that once a party has filed an appeal a stay of execution must follow as a matter of course has no legal basis."

This Court in Hon.Theodore Ssekikubo & Ors v The Attorney General & Ors, SC Constitutional Application No. 06 of 2013, while citing Akankwasa Damian v Uganda, Constitutional Application No. 7 and 9 of 2011, stated the principles to be followed in granting an application for stay of execution as follows;

1. Applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right of appeal.
2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
3. If 1 & 2 have not been established, Court must consider where the balance of convenience lies.
4. The applicant must also establish that the application was instituted without delay.

With regard to the first condition as to whether the appeal raises substantial issues which merit consideration by this Court, we have

taken into account the submission of Counsel for the respondents that the provisions of the **Advocate's Act** sought to be declared unconstitutional by the applicant had already been affirmed by this Court to be Constitutional in **Vicent L' Okucha Emoru Versus Attorney General (Supra)**. Upon reading the said judgment and the applicant's Petition, we find that although some of the provisions that were challenged in **Vicent L' Okucha's** case are similar to the provisions sought to be declared unconstitutional in the applicant's Petition, there are some other provisions of the **Advocate's Act** that are being challenged by the applicant in the pending Petition which were not considered in the **Vicent L' Okucha's** case.

Therefore, we do not accept the contention by Counsel for the respondents that the issues in the applicant's petition have already been determined this Court in that case.

The applicant in his Petition contends that he has suffered and is likely to continue to suffer infringement of his fundamental rights as a result of the decision of the 2nd respondent that are inconsistent with the Constitution.

The right to be heard is a non-derogable right under the Constitution, and any allegations of violation of the same cannot be treated as trivial.

Be that as it may, for purposes of determining whether the applicant's Petition raises a prima-facie case as required by applications of this nature, we have had the opportunity to browse through the provisions of the Advocates Act being challenged and the Articles of the Constitution they allegedly infringe and without delving into the merits of the application the applicant has not satisfied us in any way that the petition has great likelihood of success. Consequently, the first condition for grant of an application of this nature has not been satisfied.

On irreparable damage, we find that the applicant did not state in his affidavit in support of this application that he would suffer irreparable loss if this application is not granted. However, he averred that his Petition which has high chances of success would be rendered nugatory if this application is not granted and execution takes place. His counsel alluded to the fact that he will suffer hardship if this application is not granted.

Black's Law Dictionary, 9th Edition at page 447 defines irreparable loss as "damages that cannot easily be ascertained because there is no fixed pecuniary standard of measurement" In City Council of Kampala vs. Donozio Musisi Sekyaya C.A CA03/2000 this Court defined irreparable loss as; "loss that cannot be compensated for with money."

We find that the likely loss that the applicant would suffer if this application is not granted is twofold and they cannot be classified as irreparable loss. The first type of loss would be payment of the money the 2nd respondent found to be due from him plus costs and the second one would be his inability to practice law for the period of suspension. However, the first type of loss could not be classified as irreparable loss because the amount involved is already ascertained and it can be compensated for with money. The argument based on inability to pay or hardship has also been held not to constitute grounds for granting a stay of execution. See: **Teddy Seezi** Cheye versus Enos Tumusiime Court of Appeal Civil Application No. 21 of 1996.

The argument that the Petition will be rendered nugatory has no merit as the Petition seeks the interpretation of the Constitution, and Constitutional Court would still hear and determine it even when this application has not been granted. It appears that the purpose of the applicant's petition and this application are intended to obtain reliefs the applicant failed to obtain at the High Court.

It is apparent to us that the applicant by filing the petition and this application is seeking to have the issue of accountability of the money he

received for his clients in the civil suits cited at page one of this Ruling determined by this Court. That issue could be determined under Section 34 of the Civil Procedure Act. He could still have his appeal against the Ruling of the 2nd respondent reinstated if he applied for extension of time within which to appeal. He could also have sought leave to appeal against the decision of the High Court in judicial review proceedings.

As regards the suspension, it is our view that it cannot be said to cause irreparable loss because the applicant's two year suspension would be lapsing in May 2016 assuming the period of suspension started running from 8th May 2013 when the applicant's application for review at the Civil Division of the High Court was dismissed and the interim order of stay of execution lifted.

In the premises, we find that no irreparable loss will be suffered by the applicant if this application is denied. On the whole, we are not satisfied that this is a matter in which this court ought to grant an order of stay of execution. Consequently, we decline to grant the orders sought in this application.

Costs of this application will abide the result of the petition.

We so order.

Dated at Kampala this 2nd day of March 2016.

1. Hon. Justice Kenneth Kakuru

JUSTICE OF APPEAL

2. Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

3. Hon. Justice Barishaki Cheborion

JUSTICE OF APPEAL