

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPLICATION NO. 0286 OF 2020**

*(Arising from Court of Appeal Civil Application No. 0285 of 2020; itself arising from High Court Consolidated Civil Suits No. 532 of 2014 and No. 792 of 2014)*

- 1. ASANTE AVIATION LIMITED**
- 2. RONALD KASOZI LUBEGA**
- 3. HOPE SHEILA BUSINGYE**
- 4. IRENE TIBAHAIHIRE:::APPLICANTS**

**VERSUS**

- 1. STANBIC BANK UGANDA LIMITED**
- 2. MUHANGI NOEL:::RESPONDENTS**

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.**

**RULING OF THE COURT**

This application came before me sitting as a single Justice of this Court, and was stated to have been brought pursuant to **Section 12 (1)** of the **Judicature Act, Cap. 13, Rules 2 (2), 6 (2) (b), 42 (1), 43 and 44 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10**. By the application, the applicants are seeking for the following:

- "(1) An order of interim stay of execution to restrain the respondents, their servants/agents or any person acting on their behalf from executing the decree passed by the High Court in consolidated Civil Suits No. 532 of 2014 and No. 792 of 2014 pending the hearing and disposal of the main application for stay of execution.**
- (2) An order to ensure that Aircraft Reg. No. 5X-AMC currently grounded and in possession of the respondents is released to the applicants.**
- (3) Costs of the application."**

The grounds of this application are summarized in the Notice of Motion of the applicants, as follows:

- "1) The 1<sup>st</sup> applicant filed High Court Civil Suit No. 532 of 2014 against the respondents for an order of relief and protection against enforcement and crystallization of the securities by way of**



debenture or charges by the respondents and discharge of obligations under the Aviation Loan Facility.

- 2) The 1<sup>st</sup> respondent also filed Civil Suit No. 792 of 2014 against the applicants for recovery of US Dollars 2,387,909 together with interest thereon arising out of the three aviation loan facilities and an overdraft facility advanced by the 1<sup>st</sup> respondent to the 1<sup>st</sup> applicant and secured by the respective personal guarantees of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants.
- 3) The two suits were consolidated by an order of Court vide Miscellaneous Application No. 800 of 2015 and dealt with jointly.
- 4) On the 19<sup>th</sup> day of February, 2020 when the suit came up for hearing, Civil Suit No. 532 of 2014 was dismissed as against the 2<sup>nd</sup> respondent for want of prosecution and the parties were directed to file written submissions for the final determination of the consolidated suits.
- 5) On the 14<sup>th</sup> day of July, 2020, Judgment in the consolidated suits was delivered; Civil Suit No. 532 of 2014 was dismissed, and in Civil Suit No. 792 of 2014, judgment was entered in favour of the 1<sup>st</sup> respondent.
- 6) The applicants being dissatisfied with the decision of the Court, filed a Notice of Appeal in the Court of Appeal and a letter requesting for record of proceedings of the High Court was also filed.
- 7) The applicants further filed in the High Court, Miscellaneous Application No. 555 of 2020, for stay of execution of the decree pending appeal from the Judgment of the Court.
- 8) The said Application was heard and determined by the learned trial Judge on the 16<sup>th</sup> day of October, 2020 pursuant to which it was ordered as a precondition that the stay of execution issues subject to the following conditions:
  - a) That the applicants deposit in Court 70% of the decretal sum of USD 2,291,006.37 within a period of 30 days in two (2) instalments.
  - b) That the 1<sup>st</sup> instalment be payable within 15 days from the date of the ruling and the 2<sup>nd</sup> instalment within the next 15 days.
- 9) The conditions upon which the Order for stay of execution was given were harsh and unconscionable and in essence amounted to

**enforcement of the decree in total disregard of the applicants' pending appeal.**

- 10) The respondents have since the month of July 2020 after delivery of the Judgment in the consolidated suits grounded the 1<sup>st</sup> applicant's Aircraft Reg. No. 5X-AMC which is subject to the intended appeal without any Court Order, a fact that has hindered the 1<sup>st</sup> applicant's business thereby making it impossible for them to meet the conditions set by Court let alone pursue the intended appeal.**
- 11) There is a serious threat of execution as the respondents were on the 21<sup>st</sup> October, 2020 ready to sell the 1<sup>st</sup> applicant's aircraft Reg. No. 5X-AMC having advertised the same in the Monitor Newspaper of 8<sup>th</sup> October, 2020.**
- 12) The applicants have filed in this Court the substantive Application for stay of execution and the same is still pending hearing before this court.**
- 13) If the interim stay of execution is not granted, the respondents will proceed with the execution of the decree and the said substantive application and the applicant's appeal will be rendered nugatory.**
- 14) In the interest of justice, it is fair and just that an order of interim stay of execution doth issue restraining the respondents from carrying out the said execution pending the hearing and final disposal of the substantive application for stay of execution."**

The evidence in support of the grounds of the application is contained in the affidavit of Kasozi Ronald, the 2<sup>nd</sup> applicant who is also stated to be a Director in the 1<sup>st</sup> Applicant Company.

The respondents opposed the application. Ms. Daisy Alinda, stated to be an Advocate and a Legal Officer with the 1<sup>st</sup> respondent, deponed an affidavit in reply to the application on behalf of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent deponed an affidavit on his own behalf in reply to the application.

### **Representation.**

At the hearing, all the applicants were represented by Mr. Amos Mushaija, learned Counsel. Mr. John Fisher Kanyemibwa, also learned Counsel, appeared for the respondents.



The written submissions of the respective parties are on Court record, and have been considered.

**Applicants' submissions.**

Counsel for the applicants submitted that the present application meets all the necessary criteria for grant of an order of interim stay of execution as laid down in the authority of **Hwan Sung Industries Ltd vs. Tajdin Hussein and 2 Others, Supreme Court Civil Appeal No. 19 of 2008, per Okello JSC**, as follows:

**"For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."**

Counsel further submitted that since the delivery of the relevant High Court judgment, the applicants have filed a Notice of Appeal; as well as a letter requesting for the Record of Proceedings in the High Court, and have also lodged a copy of the Notice of Appeal in this Court. The applicants have filed a substantive application for stay of execution in this Court which is yet to be fixed for hearing. While the substantive application for stay of execution is pending fixing for hearing, there is a serious threat of execution of the relevant High Court judgment and decree, signified, when on the 8<sup>th</sup> of October, 2020, the respondents placed an advertisement in the Monitor Newspaper that the applicant's aircraft Reg. No. 5X-AMC would be sold on the 21<sup>st</sup> of October, 2020. Counsel contended that the respondents, who have illegally deprived the applicants of access to their aircraft without a Court Order may proceed to sale the same in execution of the relevant High Court judgment and decree, after the expiry of 30 days stipulated in the High Court Order for stay of execution. Thus it is necessary for this Court to grant an order of interim stay of execution to prevent the main application for stay of execution before this Court from being rendered nugatory.

In conclusion, counsel prayed that this Court allows the present application and grants the orders sought therein.



## **Respondents' submissions.**

Counsel for the 1<sup>st</sup> respondent contended that the present application is lacking in merit and is an abuse of Court process. The applicants are seeking for an order of stay of execution yet they have already obtained a conditional order of stay of execution of the relevant judgment and decree from the High Court vide Miscellaneous Application No. 555 of 2020 whereby the Court ordered the applicants to pay 70% of the decretal sum within a stipulated time before the stay of execution of the relevant judgment and decree could be implemented. The applicants have failed to abide by the terms of the conditional order of stay of execution and instead have chosen to bring a fresh application in this Court, which, in counsel's view, is proof that the applicants are acting in bad faith.

Counsel further contended that the applicants' submission that the pendency of a substantive application for stay of execution is the only criteria to be satisfied for the Court to grant an interim order of stay of execution was incorrect. In such applications, the Court also has to be satisfied that the application for an interim order of stay of execution is bonafide. He relied on the authority of **Akright Projects Limited vs. Executive Property Holdings Limited and 12 Others, Supreme Court Civil Appeal No. 003 of 2011** in support of his submissions. Counsel contended that the present application is not bonafide but was instituted in abuse of court process.

Relying on **Rule 42 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10**, and the authorities of **Musiitwa Kyazze vs. Eunice Busingye, Supreme Court Civil Application No. 18 of 1990**; and **Joel Kato and Another vs. Nulu Nalwoga, Supreme Court Civil Application No. 12 of 2011**, for the proposition that an application for stay of execution should first be made and considered by the lower Court, and only when it is dismissed should the applicant institute a fresh application in this Court. Counsel submitted that in the present case, the applicants' application for stay of execution in the High Court was allowed albeit with conditions requiring the applicants to deposit in Court, 70% of the decretal sums as security for the due performance of the relevant decree.

Counsel further submitted that the applicants' contention that the conditions attached to the High Court order of stay of execution were harsh and



unconscionable, thereby justifying their instituting another application for stay of execution in this Court is incorrect. The applicants have previously expressed willingness to abide by the conditions issued by the High Court before it could implement an order of stay of execution. By a letter of the 19<sup>th</sup> October, 2020, written by their advocates M/S Kakuru & Co. Advocates, the applicants expressed willingness to abide by the conditions imposed by the High Court before it could implement an order of stay of execution. Owing to the reasons cited above, counsel prayed that this Court holds that the applicants are acting in bad faith in prosecuting the present application.

Counsel also submitted that the present application is an abuse of court process as far as the 2<sup>nd</sup> respondent is concerned given that he was not party to the judgment in the relevant suits, the execution of which the applicants are seeking to stay in the present application. Counsel pointed out that although the 2<sup>nd</sup> respondent had been jointly sued with the 1<sup>st</sup> respondent vide High Court Civil Suit No. 532 of 2014, the Court had in that suit passed an order dismissing the suit as and against the 2<sup>nd</sup> respondent for want of prosecution. Counsel further pointed out that the above notwithstanding, the applicants had erroneously added the 2<sup>nd</sup> respondent as a party to the application for stay of execution in the High Court but the Court had ruled that the 2<sup>nd</sup> respondent was wrongly added thereto as well as he was not a party to the relevant judgment and decree. Counsel submitted that the applicant's insistence on dragging the 2<sup>nd</sup> respondent to the present application is a display of further bad faith.

### **Resolution of the application.**

I have carefully studied the Court record comprising of the Notice of Motion application, the affidavit in support of the application, and the respondent's respective affidavits in reply to the application. I have also considered the submissions from counsel on either side, the law and authorities cited in those submissions, as well as those not cited which are relevant to the determination of this application.

I note that in a decree passed by the High Court (Commercial Division) on the 14<sup>th</sup> July, 2020, arising out of the judgment in consolidated Civil Suits No. 532 of 2014 and No. 792 of 2014, it was decreed that the 4 applicants jointly and severally pay to the 1<sup>st</sup> respondent monies to the tune of US



Dollars 2,291,006.37. The High Court (Wabwire, J.) had in the relevant judgment found that the monies were owing to the 1<sup>st</sup> respondent under a loan facility extended to the 1<sup>st</sup> applicant and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants, but repayment of which had been defaulted.

The applicants were dissatisfied with the Judgment and decree of the High Court, and filed a Notice of Appeal to this Court. The applicants also filed an application for an order of stay of execution in the High Court. The ruling in the matter was delivered on the 16<sup>th</sup> day of October, 2020, wherein the applicants were granted an order of stay of execution of the judgment and decree in Consolidated Civil Suits No. 532 of 2014 and No. 792 of 2014, on fulfilment of the condition that they deposited in the High Court, 70% of the decretal sum in the relevant suits within 30 days from the date of the order, in order for stay of execution of the relevant judgment and decree to be implemented.

It is therefore clear that the learned trial Judge made an order for stay of execution, albeit with conditions which was within his discretion to do. On passing the said order, the applicants felt that the conditions imposed on them by the learned trial Judge were harsh and unconscionable, and decided to pursue the course of filing a fresh application for stay of execution in this Court hence the present application.

I note that by **Rule 6 (2) (b)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, this Court has the powers to stay the execution of a judgment of the High Court against which an appeal before it has been preferred, and provides as follows:

**"....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 High Court, too, has powers to grant orders of stay of execution of a decree passed by it which is the subject of an appeal before this Court. Therefore, in such circumstances, the Court of Appeal and the High Court have concurrent jurisdiction to grant an order for stay of execution of a decree passed by the High Court. In such instances, the law is that the application for stay of execution should first be made in the High Court, and

only if the High Court refuses to grant a stay of execution, should another application be made in this Court. This is the import of **Rule 42 (1)** of the **Rules of this Court** which stipulates that:

**"Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court."**

In the present case, the applicants filed their application for stay of execution in the High Court as they ought to have done. The application was allowed as stated earlier. It is the conditions attached to the said order with which the applicants are aggrieved. In the authority of **Lawrence Musiitwa Kyazze vs. Eunice Busingye, Supreme Court Civil Application No. 18 of 1990** cited with approval in the authority of **Joel Kato and Another vs. Nuulu Nalwaga, Supreme Court Civil Application No. 12 of 2011**, the Supreme Court held that an application for stay of execution should first be instituted in the High Court, and in so far as relevant to this matter, only if the High Court refuses to grant the stay of execution should an application be made to the next appellate Court. In the **Musiitwa Kyazze case (supra)**, it was stated:

**"There must be substance to the application [of stay of execution] both in form and content; this Court would prefer to deal with the application for stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice.**

**This court may in special and probably rare cases entertain an application for stay before the High Court has refused a stay in the interests of justice to the parties. But before the court can act, it must be appraised of the facts."**

It is my considered view, that the present application, and indeed even the main application for stay of execution, was brought as a disguised appeal against the conditions imposed by the High Court when it granted the relevant order of stay of execution. It is also my considered view that this Court can only grant an order of stay of execution of a High Court Judgment against which an appeal has been preferred in this Court if there is no existent order of stay of execution. In the present case, there is an existent order of stay of execution made by the High Court.





Therefore, if the applicants are aggrieved with the conditions imposed by the High Court when it made a conditional order of stay of execution, they ought to have lodged an appeal to this Court, if they had a right of appeal in the circumstances. In asking this Court to reconsider a matter already determined by the High Court, in this application, the applicants are asking this Court to overlook the doctrine of res-judicata which bars the consideration of a matter which has already been considered by another competent Court. The doctrine of res judicata is embodied in **Section 7** of the **Civil Procedure Act, Cap. 71**, which provides as follows:

**"7. Res judicata.**

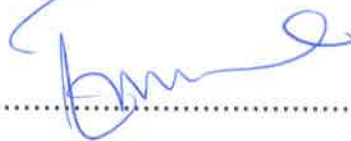
**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."**

Hence, as the High Court has already considered the issue of stay of execution of the relevant decree and judgment, this Court cannot entertain another suit for stay of execution like the present application.

In conclusion, I would decline to grant the orders prayed for by the applicants. Accordingly, this application is dismissed with costs to the respondents.

**It is so ordered.**

Dated at Kampala this 24<sup>th</sup> day of Nov 2020.



**Elizabeth Musoke**

Justice of Appeal.