

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 100 OF 2021

(Arising from High Court Civil Suit No. 721 of 2020)

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CHINA HENAN INTERNATIONAL

COOPERATION COMPANY LTD ::::::::::::::::::::::: APPLICANT

VS

JUSTUS KYABAHWA ::::::::::::::::::::::::::::::: RESPONDENT

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CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

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RULING OF COURT

This application was brought under rules 6(2), 43(1) and 44(1) of the
Judicature Court of Appeal Rules seeking for orders that;

1. Execution of the decree in Civil Suit No. 721 of 2020 be stayed
pending the determination of the Applicant's Appeal.

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2. Costs of the Application be provided for.

The application is supported by the affidavit of Zhang Jinpai, which contains the grounds upon which this application is premised and are that;

1. The applicant has lodged a Notice of Appeal, appealing against
5 the judgment and orders of Court in Civil Suit No. 721 of 2020.
2. The applicant's intended appeal raises serious questions of law and fact and has a high likelihood of success.
3. The applicant on 30th March, 2021, received garnishee order nisi issued vide Miscellaneous Application No. 392 of 2021
10 wherein all the applicant's bank accounts in Stanbic Bank were attached.
4. The garnishee nisi order in Miscellaneous Application No. 392 of 2021 was made absolute.
5. The applicant has been served with other two garnishee nisi
15 orders against Uganda National Roads Authority and Guarantee Trust Bank (U) Limited.
6. The applicant filed applications for stay of execution and setting aside the garnishee proceedings in the High Court vide Miscellaneous Applications No. 467 of 2021 and 481 of 2021.
- 20 7. The applicant's applications for stay of execution were dismissed by the trial Judge.
8. The applicant's appeal will be rendered nugatory if the respondent executes the decree in Civil Suit No. 721 of 2020 before the determination of the Applicant's Appeal.
- 25 9. The applicant will suffer irreparable loss and/or damage if the execution of the said decree is not stayed and the garnishee

proceedings are not set aside pending the determination of the applicants appeal.

10. The application has been made without any unreasonable delay.

5 11. It is in the interest of justice that the execution of the decree in Civil Suit No. 721 of 2020 be stayed pending the hearing and determination of the applicant's appeal.

The respondent filed an affidavit in reply sworn by the respondent, Justus Kyabahwa, and stated that the Garnishee Order nisi issued
10 in Misc. Application No. 392 of 2021 has since been made absolute and the funds duly transferred to the respondent's account. The respondent stated further that the Garnishee Order nisi issued against the respondent in Miscellaneous Application No. 451 of 2021 has since been made absolute and execution is complete.

15 **Background**

The respondent entered into a contract with the applicant to provide consultancy services for bid preparation, presentation and tender winning, for the construction of Rukungiri-Kihihi-Ishasha/Kanungu road in Uganda measuring about 78.5 kilometers. The project was to
20 be co-funded by the Africa Development Bank and the government of Uganda. The applicant won the project in 2018 and on 16/09/2018 signed the contract for the construction of the said road with Uganda National Roads Authority (hereinafter referred to as UNRA). According to the contract, the total agreed consideration was 4% of
25 the contract price being UGX 207,834,634,080/=. The applicant

received advance from UNRA but did not notify the respondent. The respondent notified the applicant and the parties executed a deed of variation which was founded on fraudulent misrepresentation by the applicant. The respondent sued the applicant in the High Court for
5 breach of the consultancy agreement, a declaration that the deed of variation was void ab initio, payment of USD 900,000 and general damages. Judgment was entered in favour of the Justus Kyabahwa, the respondent.

Representation

10 At the hearing of the application, Learned Counsel Mr. Laston Gulume and Learned Counsel Mr. Solomon Sadam appeared for the applicant while Learned Counsel Mr. Ahmed Kalule Mukasa and Learned Counsel Mr. Mugisha Achileo appeared for the respondent.

When this application was called for hearing, we realized that Civil
15 Application No. 129 of 2021 Uganda National Roads Authority Vs China Henan International Cooperation Group Company Limited and Justus Kyabahwa, had been filed for clarification on whether the interim order extracted on the 22nd of April, 2021 stopping any payments arising out of the Decree issued in High Court Civil suit
20 No. 721 of 2021, stayed the orders Absolute issued against the Applicant, has similar subject matter with the current application. The main application for stay of execution had come for hearing and it was not necessary to consider the application concerning an interim order issued pending hearing and determination of the main
25 application. We have decided to determine the main application for

stay of execution. UNRA was unrepresented at the hearing of this application but they filed submissions.

Applicant's arguments

5 It was submitted for the applicant that this application meets all the requisite requirements to grant an order for stay of execution. Counsel argued that the appeal in Civil Appeal No. 152 of 2021 has a high likelihood of success. That the case before the trial court related to a consultancy agreement of 30th October 2015 to which the
10 parties executed a variation dated 14th January 2019. The later agreement varied the consideration in the consultancy agreement by USD 900,000 which both parties signed. The respondent instituted a suit to recover the varied amount of USD 900,000. The trial Judge granted the USD 900,000 and in addition granted USD 450,000 as
15 general damages for breach of contract. The applicant filed a Notice of Appeal in this court.

Counsel for the applicant submitted further that the applicant is likely to suffer irreparable damage to its business and contractual works for the government projects being executed if the stay is not
20 granted. Further, that the applicant's appeal will be rendered nugatory with the disruption and frustration of its effective performance of the road construction contract with UNRA for Rukungiri-Kihihi-Ishasha/Kanungu road.

Counsel argued that the applicant seeks to stay further execution of the decree arising from Civil Suit No. 721 of 2020 which has only been partly executed. No payment has been made by UNRA against the applicant's performance certificate. Counsel relied on the case of

5 **DFCU Bank Ltd Vs Dr. Anna Persis Nakate, Civil Application No. 29 of 2003, and Wilson v. Church (1879) 12 Ch. D. 454** in which this court held that; it is the paramount duty of a court to which an application for stay of execution pending an appeal is made to see that the appeal, if successful, is not rendered nugatory.

0 **Respondent's arguments**

For the respondent, counsel submitted that the conditions for an applicant to fulfil before granting an order of stay of execution are that; the intended appeal has a likelihood of success, the applicant will suffer irreparable damage that cannot be compensated by an

15 award of damages and render the appeal nugatory, balance of convenience and the court must establish that the application was instituted without unreasonable delay. Counsel submitted that the applicant has not demonstrated a likelihood of success of the intended appeal. Counsel relied on the Supreme Court decision in

20 **Dr. Muhammed Ahmed Kisuule Vs Greenland Bank Limited SCCA No. 07 of 2010** in which an application for stay of execution was refused because the applicant failed to prove that there was a likelihood of success.

Counsel submitted further that irreparable harm should only be that

25 which cannot be compensated in damages. The applicant has not

demonstrated that there will be irreparable loss incurred if this application for stay of execution is not granted. The issue at hand is the enforcement of a purely monetary claim and there is no special quality attached to such a claim to cause irreparable loss. The respondent further argued that out of the decretal sum of 1,485,000/=-, 1,066,000 USD has already been recovered by making the garnishee orders absolute against Stanbic Bank and UNRA.

Consideration of the application.

The law governing applications for stay of execution in this court is basically rule 6(2) (b) of the Rules of this court which provides:

Subject to sub-rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay of execution but the court may-

(b) 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 stay of proceedings as the court considers just."

For an application in this court for a stay of execution to succeed, the applicant must first show that he/she has lodged a notice of appeal in accordance with rule 72 of the Rules of this court. The other facts to which lodgment of the notice of appeal is subject, vary from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted; that the applicant's appeal has a high

likelihood of success. The most often cited authority in an application of this kind is **Lawrence Musiitwa Kyazze vs Eunice Busingye, Civil Application No. 18 of 1990**, in which the Supreme Court held that;

5 *“Parties asking for a stay should meet conditions like:
(1) That substantial loss may result to the applicant unless the order is made.*

(2) That the application has been made without unreasonable delay.

10 *(3) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.*

In a more recent decision of **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013** the Supreme Court re-stated the principles to
15 consider before granting an order of stay of execution pending Appeal and these include;

1. It must be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

20 2. The application must establish that the appeal has a likelihood of success; or a prima facie case of his right to appeal.

3. If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.

4. That the applicant must also establish that the application was
25 instituted without delay.

The issue for determination by the Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

At the hearing of this application, the Applicant had not yet filed a record of appeal. As such, the issue of probability of success could not be ascertained by the Court. In our view, although the Court at this stage is not required to delve into the merits of the intended appeal, it is not sufficient for the Applicant to vaguely state that its appeal has a likelihood of success without demonstrating the evidential foundation for such an assertion. That evidential foundation would have to be contained in the record of appeal and without it, it is difficult for the Court to reach the conclusion that the intended appeal has a likelihood of success. Clearly, the Applicant must demonstrate that the points proposed to be taken on appeal are not frivolous or vexatious. See **Gashumba Maniraguha Vs Sam Nkudiye SCCA No. 24 of 2015**. In determining whether the said questions are frivolous or vexatious, the Court would have to examine the record of appeal which was not filed.

Consequently, it is our considered view that this application fails, for failure to meet the first condition to be considered in an application for stay of execution. See the case of **Dr. Muhammed Ahmed Kisuule =Vs= Greenland Bank Limited [in Liquidation] SCCA No. 07 of 2010**, where the Supreme Court dismissed an application for stay of execution because the Applicant failed to prove that he was likely to succeed on appeal. Furthermore, this Court in **Horizon Coaches**

Limited Vs Mbarara Municipal Council and others CACA No. 07 of 2014, refused to grant an order of interim injunction because the applicant had no likelihood of success in the main application and petition.

5 For the respondent, it is argued that execution has already been completed after the Garnishee order nisi in Misc. Application No. 392 of 2021 and Miscellaneous Application No. 451 of 2021 were made absolute and the funds duly transferred to the respondent's account.

Lord Denning M.R. considered the procedure for attachment of debts
10 in the case of **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225** at page 227 where he said:

*"The word 'garnishee' is derived from the Norman-French. It denotes one who is required to 'garnish', that is, to furnish, a
15 creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The
20 creditor can get a 'garnishee' order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer's £150, the £100 which he owes to the creditor.*

*There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means 'unless'. It is an order on
25 the bank to pay the £100 to the judgment creditor or into court*

within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: **see Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788.** If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days' notice, the order nisi operates as the notice.

As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: **see Joachimson v Swiss Bank Corpn [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ.** The money at the bank is then said to be 'attached', again derived from Norman-French. But the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay."

In the instant case, the Garnishee Order Nisi in Misc. Application No. 392 of 2021 and Miscellaneous Application No. 451 of 2021 were made absolute thereby operating as an order to pay the debt to the judgment creditor. It is our considered view that an order of stay of
5 execution would be made in futility.

The interim order made by Hon. Justice Christopher Madrama in Civil Application No. 101 of 2021 granted an interim stay of further execution of the decree in High Court Civil Suit No. 721 of 2021. He noted that an Order Absolute cannot be stayed but rather set aside.

By the time Hon. Justice Christopher Madrama made the interim order, the Garnishee Order nisi in Miscellaneous Application No. 451 of 2021 had been made absolute. Once a garnishee order nisi is made absolute, the execution process is complete. The issuing court is the one to set it aside not through a decision in application to stay
15 execution.

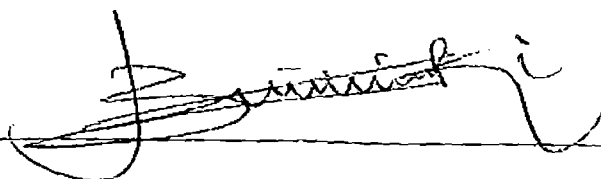
Hon. Justice Christopher Madrama held while ruling on the interim application that:

*“The execution process is complete by making the garnishee order nisi absolute. Thereafter the court has no further
20 business because it has directed the money to be paid to the judgment creditor. In the circumstances, the order can only be set aside because it would be setting aside an order directing money that is in the hands of the garnishee to be paid to the judgment creditor. That order cannot be stayed. It can only be reversed or
25 set aside.”*

The use of the words 'staying any further execution of the decree thereby stopping any further payments not yet executed" could not and did not refer to the orders absolute against the applicant because Hon. Justice Madrama had already held that that order was not
5 capable of being stayed. As rightly submitted by learned counsel for the second respondent, those words obviously referred to any other execution or order which was capable of being stayed and clearly, the order in Miscellaneous Application No. 451 of 2021 could only be set aside. From the foregoing, we find that the applicant has failed to
10 prove the elements that warrant grant of an order of stay of execution. This application lacks merit and is accordingly dismissed with costs. We so order.

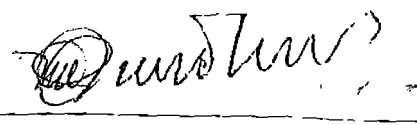
Dated this 10th day of Dec 2021

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Hon. Mr. Justice Cheborion Barishaki, JA

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Hon. Mr. Justice Stephen Musota, JA

A handwritten signature in black ink, appearing to read 'Christopher Madrama', is written above a horizontal line.

Hon. Mr. Justice Christopher Madrama, JA