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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 268 of 2021

(Arising from Civil application No. 267 of 2021)

(Arising from Civil Appeal No.135 of 2021)

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(Arising out of HCCS No.649 of 2015 & No.330 of 2016)

1. STEEL ROLLING MILLS LTD

2. NYUMBA YA CHUMA LIMITED

3. SCRAP PROCESSORS LTD:::APPLICANTS

VERSUS

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STANDARD CHARTERED BANK (U) LTD :::::::::::::::::::::::::::::::::::RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

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This application was brought under the provisions of Rules 2(2), 6(2) (b), 42(2) and 43 of the Rules of this Court and Section 98 of the Civil Procedure Act. It is for orders that:-

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- a. An interim order of stay of execution doth issue against the respondent staying the execution of the consent decree entered in HCCS No.649 of 2015 and HCCS No.330 of 2016 pending the hearing and final determination of the application for a substantive order of stay of execution.*

5 *b. Costs of this application be provided for.*

The background to the application is that the applicants filed HCCS No.649 of 2015 and HCCS No.330 of 2016 against the respondent pursuant to which a consent decree was entered on the 24th day of August 2018. The applicants filed an application for review of the consent decree vide HCMA No.161 of 2019, which
10 was accordingly granted and the consent decree set aside. The respondent then filed HCMA No.1167 of 2019 to review the orders made in HCMA No.161 of 2019 which was granted on the 28th day of September, 2020.

The applicants were aggrieved by the above mentioned decision on grounds that the trial Judge entertained and determined HCMA No.1167 of 2019 without
15 jurisdiction and upheld the entire consent judgment/decreed as having been validly executed. Subsequently, the applicants filed Civil Appeal No.135 of 2021 before this Honorable Court challenging the entire orders and proceedings in HCMA No.1167 of 2019. The applicants now seek an interim order of stay of execution against the respondent staying the execution of the consent decree
20 entered in HCCA No.649 of 2015 and HCCS No.330 of 2016 pending the hearing and final determination of the substantive application.

The grounds upon which this application is premised are contained in the Notice of Motion and the affidavit in support of the application sworn by Sami Alam, the Director of the Applicant Companies and sworn on behalf of the other
25 applicants dated 30th September, 2021. Briefly the grounds are that;

- 5 1. The applicants filed HCCS No.649 of 2015 and No.330 of 2016 against the Respondent pursuant to which a consent decree was entered on the 24th day of August 2018.
2. Being aggrieved by the consent decree on grounds of misapprehension of the facts of the said decree and the same was executed by parties who had
10 no capacity and/or authority, the Applicants filed an application for review of the consent decree vide HCMA No.161 of 2019, which was accordingly granted and the consent decree was set aside.
3. The respondent then filed HCMA No.1167 of 2019 to review the orders made in HCMA No.161 of 2019 which was granted on the 28th day of September,
15 2020.
4. The applicants were aggrieved by the above mentioned decision on grounds that the trial Judge entertained and determined HCMA No.1167 of 2019 without jurisdiction and upheld the entire consent judgment as having been validly executed
- 20 5. Subsequently, the applicants filed Civil Appeal No.135 of 2021 before this Honorable Court challenging the entire orders and proceedings in HCMA No.1167 of 2019.
6. Before the applicants' appeal could be heard and determined by the Honorable Court, the respondent commenced execution proceedings of the
25 impugned consent decree.
7. The applicants filed HCMA No.140 of 2021 for an order of stay of execution pending the hearing and final determination of the Applicants' appeal in the

5 *commercial division of the High Court which was dismissed by the trial Judge on the 28th day of September, 2021.*

8. *The applicants' appeal has a very high likelihood of success as it raises serious issues of law and fact that ought to be determined by this Court.*

9. *There has been no ordinate delay to present this application and it is not intended to waste Court's time.*

10. *This application is urgent as the respondent has threatened to execute the consent decree before the hearing and final determination of Civil Appeal No.135 of 2021 which is pending before this Court.*

11. *The applicants have filed an application for a substantive order of stay of execution in this Honorable Court which is pending hearing and final determination by this Court.*

12. *That if this application is not granted, both the main application for substantive order of stay of execution and civil Appeal No.135 of 2021 will be rendered nugatory.*

13. *The applicants stand to suffer substantial loss and irreparable damage that cannot be atoned for by the respondent if this application is not granted since the respondent shall dispose of their valuable commercial properties that they acquired and made substantial investments thereon.*

14. *The balance of convenience greatly favors the applicants who are still in possession of their properties which the respondent seeks to attach in execution of an illegal consent decree.*

5 15. *It is fair, just and urgent that an interim order be issued staying the execution of the consent decree pending the hearing and final determination of the main application for a substantive order of stay of execution.*

The respondent opposed the application and filed an affidavit in reply on 19th October, 2021 and deponed by Mr. Richard Ssuna, the Manager Special Assets
10 in the Respondent's Company. The grounds in opposition are;

a. *That on 30th December, 2010, the 1st applicant obtained a loan facility from the respondent. The loan facility was secured by a mortgage over different properties, including property comprised in LRV 1618 Folio 17 Plot M.78 Bidco Road, Masese- Jinja.*

15 b. *The 1st applicant defaulted on its loan obligations and requested the respondent to restructure the existing loan facility. On 23rd January, 2014 the respondent approved and offered the 1st applicant a fresh loan facility worth 5,500,000,000/= (Uganda Shillings Five Billion Five Hundred Million) and USD 3,500,000 (United States Dollars Three Million Five Hundred
20 Thousand).*

c. *The 1st applicant defaulted on its loan obligations and despite several reminders, it failed/ refused to pay the amounts due under the loan agreement thereby forcing the respondent to recall the loan in accordance with the law and mortgage deed, demanding repayment of the total monies
25 due to it under the mortgage.*

5 d. That on 14th October, 2015, in an effort to delay recovery measures, the applicants filed HCCS No.649 of 2015 against the respondent and in 2016, the 1st applicant filed HCCS No.330 of 2016 against the respondent.

10 e. That on the 28th day of August 2018, after several months of negotiation, the applicants and the respondent entered into a consent judgment in the aforementioned suits and the applicants undertook to pay a total sum of USD 7,300,000 (United States Dollars Seven Million Three Hundred Thousand) within a period of 8 months.

15 f. The applicants did not comply with the terms of the consent within the stipulated time and the respondent filed an application for execution of the decree.

 g. The applicants then filed Misc. Application No.161 of 2019 seeking to set aside the consent judgment as a tactic to delay the respondent's recovery measures.

20 h. That on 29th November, 2019, judgment was delivered and the consent judgment was set aside on grounds that it should have been signed by the receiver and not the director of the Applicants.

25 i. That the respondent then filed an application vide Misc. Application No.1167 of 2019 against the applicants seeking for review of the decision in Miscellaneous Application No.161 of 2019, on grounds that there were errors apparent on the face of the record.

5 j. That on 28th September 2020, the Court agreed with the submissions of the respondent, granted the application and upheld the consent judgment executed between the parties.

10 k. That the respondent then applied for execution of the consent decree vide EMA No.6 of 2021 and served the applicants with a Notice to show cause why execution should not issue against them.

15 l. That when the application for execution came up for hearing, the applicants informed Court that they had filed Misc. Application No.140 of 2021 for an order of stay of execution. The Court granted an order maintaining the status quo until the disposal of that application.

20 m. That the application was heard and on the 28th day of September, it was dismissed with costs to the respondent. The Honorable Judge noted that the back and forth activity defeats the ends of justice and granting the application would be an abuse of Court process.

25 n. That this application contains no grounds to warrant the grant of an order for stay of execution.

30 o. That the plant and machinery comprised in the mortgaged properties is continuously depreciating as the receiver has been denied access to the property. The respondent's main security is going to waste and the respondent shall be unable to recover the outstanding amount if this application is granted.

35 p. That the applicants have been in Court since 2015 and six years down the road, all that is being litigated are the preliminary issues. In the six years,

- 5 *the applicants have tried to cause the lease agreement over the mortgaged land to be transferred without consent of the respondent. The applicants have depleted the plant and machinery intentionally. The 1st applicant is totally being wasted.*
- 10 *q. That the applicants have abused court process by filing frivolous applications which lack merit and it is in the interest of justice that this application be dismissed.*
- r. That the applicant has not offered security for due performance of the decree. This Court should order the applicant to deposit the decretal amounts in Court.*
- 15 The applicants filed an affidavit in rejoinder sworn by Sami Alam, the Director of the Applicant Companies briefly stating that;
- i. The respondent admits the existence of Civil Appeal No.135 of 2021 that is pending hearing and determination before this honorable Court.*
- 20 *ii. The above mentioned appeal raises serious questions of law and fact and has a high likelihood of success and shall be rendered nugatory if this application is not granted.*
- iii. The instant application presents valid grounds for the grant of an order of stay of execution as there is a pending appeal and a substantive application for stay of execution and the respondent applied for execution of the*
- 25 *impugned consent decree.*

- 5 iv. *There has not been any wastage and/or depreciation of the applicants' machinery and plant as alleged by the respondent.*
- v. *In the alternative but without prejudice to the foregoing, the applicants' properties have been under the management and supervision of the Respondent's agents who were appointed as receivers and therefore any*
10 *alleged damage and/ or loss of the said property ought to be visited on the respondent.*
- vi. *With irrational regards to the grounds for the payment of security for due performance, the applicants reiterate their earlier commitment to furnish the same to this Court once directed.*
- 15 vii. *The respondent's averment to deposit the decretal amounts in Court is not supported by any provision of the law.*
- viii. *The applicants are not indebted to the respondent in the amounts claimed and the respondent is only avoiding the Court process as directed by the trial Judge in HCMA No.161 of 2019 by filing frivolous applications to delay*
20 *the hearing of the main suits on their merits.*
- ix. *The respondent's will not suffer any prejudice in anyway if this application is granted since the applicants raise serious points of law that ought to be determined by the appellant Court.*

At the hearing of the application Mr. Charles Nsubuga and Mr. Betunda Yusuf
25 appeared for the applicants while the respondent was represented by Mr. Bruce Musinguzi and Ms. Akantorana Kobusingye.

5 The record shows that the applicants were directed by Court to file their written submissions by 27th October and the respondents to file by 3rd November. The respondents have not filed their submissions to date.

Counsel for the applicants submitted that the application before this Court merits the grant of an interim stay of execution. That for the Court to exercise
10 its discretion and allow an application of this nature, all that is required is for the applicant to show that there is a substantive application for stay of execution and/ or an injunction pending before this Court and that there is a serious threat of execution before the hearing of the pending substantive application. He relied on ***Hwang Sung Industries Limited V Tajdin Hussein & 2 Others SCCA***
15 ***No.19 of 2008***

Counsel further submitted that the applicants filed a Notice of Appeal on the 30th day of September, 2020 and requested for a typed record of proceedings for Miscellaneous Application No.1167 of 2019. That the said Notice of Appeal was filed within the 14 days stipulated by the law hence there was no unreasonable
20 delay on the part of the applicants. He further submitted that the respondent has threatened to execute the orders made in Miscellaneous Application No.1167 of 2019 that why the applicants were served with a notice to show cause why execution should not issue. Counsel submitted that for an order to be stayed, such order must be capable of being executed and the purpose of an order of
25 stay of execution is to preserve the status quo. He relied on ***Kyambogo University V Prof. Isaiah Omolo Ndiege, Civil Application No.341 of 2013***

5 ***and National Enterprise Corporation V Mukisa Foods, Miscellaneous Civil Application No.7 of 1998.***

Counsel submitted that the applicants will suffer substantial loss if the interim order of stay of execution is not granted because the respondent applied and appointed a receiver in respect of the 1st applicant who has continued to manage
10 the affairs of the 1st applicant without providing any accountability to the directors and shareholders of the 1st applicant company. He further submitted that the applicants were in position to furnish security for due performance of the order once directed to. He prayed that the application be granted and relied on ***International Credit Bank Limited (In Liquidation) V Tropical***
15 ***Commodities Supplies Limited & 2 Others, Civil Appeal No.24 of 2004.***

Rules 6 (2), 42 (2) and 43 of the rules of this court give wide discretion to this Court to grant interim or substantive orders of stay of execution for purposes of preserving the right of appeal, but this should be where special circumstances exist. ***See: Lawrence Musiitwa Kyazze V Eunice, Supreme Court Civil***
20 ***Appeal No. 018 of 1990.***

In ***Zubeda Mohamed & Sadru Mohamed V Laila Kaka Wallia & Ancr, Supreme Court Civil Reference No.07 of 2016*** which cited with approval ***Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008***, the Supreme Court stated as follows;

25 *“Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending*

5 *and whether there is a serious threat of execution before hearing of the*
substantive application. Needless to say, there must be a Notice of Appeal.
*See **Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA***
No. 19 of 2008.

10 *In summary, there are three conditions that an applicant must satisfy to*
justify the grant of an interim order:

1. *A competent Notice of Appeal;*
2. *A substantive application; and*
3. *A serious threat of execution.”*

15 In the instant application, counsel for the applicants submitted that the
applicants had filed a notice of appeal and the same was lodged with the
Registrar of the High Court on the 30th day of September, 2020. Although the
applicants did not attach a copy of the Notice of Appeal to their application, the
records from the Court Registry show that the applicant filed a Notice of Appeal
referenced as Civil Appeal No.135 of 2021. The applicants however attached a
20 Memorandum of Appeal marked as “Annexure D”.

A substantive application for stay of execution has also been filed vide Civil
Application No.267 of 2021. The same having been filed on the 4th day of
October, 2021.

As regards the existence of a threat of execution, counsel for the applicants
25 submitted that the respondent had already commenced execution proceedings

5 and this is evidenced by the Notice to Show Cause why Execution should Not
Issue marked as annexure "E". He added that the respondent's threat of
execution still continues to subsist since execution is a process and not an event.

I find that there is an eminent threat of execution since the applicants have
already been served with a Notice To Show Cause Why Execution Should not
10 Issue. This is evident that execution of the decree in HCCS No.649 of 2015 and
HCCS No.330 of 2016 has commenced.

In conclusion, the applicant has satisfied the conditions required for grant of an
interim order of stay. I allow the application and make the following orders:-

1. An interim order of stay of execution is hereby issued against the
15 respondent staying the execution of the consent decree entered in HCCS
No.649 of 2015 and HCCS No.330 of 2016 pending the disposal of Civil
Application No.267 of 2021 or until further orders of this Court.
2. The Registrar of this Court is hereby directed to fix Miscellaneous
Application No. 267 of 2021 for hearing in the next 21 days.
- 20 3. The costs of this application shall abide the outcome of the substantive
application for stay of execution.

I so order

Dated at Kampala this6th.....day ofDec..... 2021


CHEBORION BARISHAKI
JUSTICE OF APPEAL