IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Irene Mulyagonja, JA, Sitting as a Single Judge

CIVIL APPLICATION NO 177 OF 2023

ARISING FROM CIVIL APPEAL NO. 173 OF 2023

[All arising from Kampala High Court (Commercial Division) Civil Suit No 321 of 2018 & High Court Miscellaneous Application No. 1315 of 2021]

IDRINGI PATRICK VIERA::APPLICANT

VERSUS

LAWRENCE B. TUMUSIIME:::::::::::::::::::::::::::::::::::::: RESPONDENT

RULING

The applicant brought this application under section 48 (1) (b) of the Judicature Act and rules 2 (2), 6 (1) and (2) (b) and 43 (1) and (2) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. He sought an order to stay execution of the judgment of the High Court in Civil Suit No. 1315 of 2021 pending the determination of his appeal in this court.

The grounds of the application were stated in the application but more particularly set out in the affidavit in support deposed by the applicant on 17th March 2023. The salient facts stated therein were that judgment in HCCS No 321 of 2018 was delivered against him by Gaswaga, J on 16th August 2021. That he was aggrieved by the decision because though he filed a defence in the suit, judgment passed *ex parte*. That he applied to set aside the judgment and stay its execution in HCMA No. 321 of 2021 but it was erroneously dismissed by Kakooza Sabiiti, J on 29th March 2021.

Mr Idringi Patrick further averred that he filed a Notice of Appeal against that decision and applied for a certified copy of the proceedings. That security for costs of UGX 200,000 was paid in this court and a general receipt issued in that regard. Further that there is a serious threat of execution because the respondent commenced execution proceedings when he sought to have the costs of the suit taxed. Copies of the bill of costs and a hearing notice were annexed to the affidavit. He further averred that he is informed by his lawyers that once taxation of the bills is completed the next step will be execution of the orders in the judgment and ruling referred to above. The applicant then asserted that if execution is not stayed he will suffer irreparable loss that cannot be compensated in damages and his appeal will be rendered nugatory.

The respondent opposed the application in his affidavit dated 15th May 2023. He stated that he was advised by his advocates that the application to stay execution of the judgment brought by one Idringi Patrick Viera and the ruling of the High Court in MA No 1315 of 2021 against Patrick Idringi Salvado is an abuse of court process because Idringi Patrick Viera had no basis of filing the application without a deed poll to change the name of the judgment debtor. That he sued Patrick Idringi Salvado in the High Court as it is shown in the plaint, written statement of defence and the rest of the process of court attached to the affidavit in reply.

The respondent went on to respond to the application, without prejudice to the assertions above. He contended that the security for costs that was paid by Patrick Idringi Viera in this court has nothing to do with the ruling in HCMA 1315 of 2021, because Patrick Idringi Viera was not the applicant in that application. That in addition, there is no threat of execution against Patrick Idringi Viera, the applicant now before this

court. Further that the taxation of the costs in the suit has nothing to do with the applicant in this application, Patrick Idringi Viera.

The respondent further averred that he is a certified accountant and it is not true that the applicant will suffer irreparable loss that cannot be compensated for in damages in the event that execution is not stayed. That he has the capacity to refund the decretal sum in HCCS No 321 of 2018 and the costs in Application No 1315 of 2021. He denied that the appeal by Partick Idringi Viera would be rendered nugatory if he proceeds to recover the decretal sum from Patrick Idringi Salvado. Further that in the event the court deems it fit to grant an order to stay execution, the applicant should be ordered to deposit the sum of UGX 514,264,750 with interest at 6% per annum from the 16th August 2021.

The applicant filed an affidavit in rejoinder dated the 22nd May 2023. In the affidavit he states that the respondent is mistaken in his assertions; he has never changed his name and his name is still Idringi Patrick Viera, as it appears in his National Identity Card, a Photostat copy of which was **Annexure A** to the affidavit in rejoinder. That the name ***"Salvado"*** is his alias/stage name with which the majority of persons identify him. That as a result, his name "Idringi Patrick Viera" and "Partick Idringi Salvado" as well as "Idringi Patrick Viera (Salvado)" are at times inadvertently used interchangeably, but they all refer to him as one and the same person.

The applicant further averred that the pleadings that are attributed to Patick Idringi Salvado are attributable to him, Idringi Patrick Viera as one and the same person. That he was the applicant (in MA 1315 of 2021) and he deposed an affidavit rejoinder in which he stated that he was Idringi Patrick Viera (also known as Salvado). A copy of the said affidavit was attached to the affidavit in rejoinder as **Annexure R2**.

Further that the use of the name ***Salvado*** by the respondent was a misnomer and the respondent suffers no prejudice since he sued him using his stage name and not his legal name. The applicant then launched into an explanation of how judgment passed *ex parte* against him yet he was in constant communication with lawyers, at the time M/s R. Mackay, Advocates.

Representation

At the hearing of the application, the applicant was represented by Mr Robert Apenya, while the respondent was represented by Mr Edwin Ayebare. The applicant was also present in court.

Submissions of counsel

Counsel for both parties filed written submissions as directed by court on the 15th and 18th May 2023, respectively. The applicant's lawyers filed submissions in rejoinder on 23rd May 2023.

In his written submissions, counsel for the applicant stated that the grant of an order to stay of execution by court is discretionary. He referred to the decision of the Supreme Court in **Theodore Ssekikubo & Other v Attorney Genearl, Constitutional Application No 003 of 2014** and **Lawrence Musiitwa Kyaze v Eunice Busingye Supreme Court Civil Application No 018 of 1990** for the principles that guide the courts in granting orders for stay of execution. He then argued the application on the basis of the principles that were stated by this court in **Kyamobogo University v Isaiah Omolo Ndiege, Civil Application No. 341 of 2013**, which, I observed was an application for an interim order for stay of execution, not for a substantive application for the same order like the instant application is.

He then submitted that there is a notice of appeal that has been lodged in this court together with a letter requesting for the record of proceedings in the lower court. Further that the applicant has since the lodgement of the notice of appeal served the respondent with the appeal. The memorandum of appeal was never exhibited in any of the affidavits filed by the applicant.

Counsel went on to submit that there is a serious threat of execution because the respondent filed a bill of costs in the High Court to tax the costs that are due to his advocates. Counsel asserted on authority of **Osman Kassim Ramathan v Century Bottling Company Ltd, Supreme Court Civil Application No. 35 of 2019,** that the taxation of costs is a process of law for the enforcement of or giving effect to the judgments or orders of a court of justice and accordingly constitutes an imminent threat to execution. He further submitted that the applicant will suffer substantial loss if execution is not stayed because he will be obligated to pay the decretal sum without being given an opportunity to present his defence. He explained that the applicant would pay taxed costs of more than UGX 50 million in addition to the decretal sum of UGX 500 million, together with interest thereon.

As to whether the applicant has furnished security for the performance of the decree or order as may be ultimately binding upon him, counsel submitted that the applicant deposited UGX 200,000 in court. That however, the condition of granting security for the due performance of the decree is not a mandatory requirement but rather based on the discretion of the court. He referred to **Imperial Royale Hotel Ltd & 2 Others v Ochan Daniel, Miscellaneous Application No. 111 of 2012**.

Counsel finally submitted that the appeal is not frivolous and has a likelihood of success because the learned judge of the High Court in

HCMA No 1315 of 2021 misapplied and misconstrued the facts when she ignored the glaring evidence adduced by the applicant that the failure to attend the hearing was occasioned by the mistake of his advocates, M/s R. Mackay Advocates. With regard to the balance of convenience he submitted that if not granted, the respondent will be at liberty to execute for the two bills of costs arising from the two decisions of the lower court, which will put the applicant through more hardship than it would avoid, given that the applicant is challenging the same. That such execution will render the appeal nugatory. That in addition, this application was brought without unreasonable delay. He prayed that the application be allowed.

In reply, counsel for the respondent submitted extensively about the disparity in the name of that applicant under which he was sued and that which he used to bring this application. I saw no difference between the averments in the affidavit in reply and the submissions of counsel on that point, so I will say no more about the submissions on that point.

With regard to the merits of the application, counsel for the respondent submitted that the applicant did not comply with the requirement to file a notice of appeal as it is provided for in rule 6 (2) (b) of the Rules of this court. He again dwelt on the names of the applicant as being inconsistent with each other in the proceedings before court and this application. He added that this application, as filed in this court, is in abuse of court process, since in his view it is an improper and tortious use of legitimately issued process to obtain a result that is unlawful or beyond the scope of the process. That it was an abuse of court process especially because the applicant brought the application under a different name than that under which he was sued in the court below. He referred to **Uganda Land Commission v James Mark Kamoga &**

Another, Supreme Court Civil Application No 08 of 2004, for the definition of what amounts to "abuse of court process."

Counsel went on to submit that the applicant did not show that he will suffer loss if an order to stay execution is not granted in this application. He did not demonstrate that the respondent is incapable of reimbursing the decretal sum to him, in the unlikely event that the applicant is successful in his proposed appeal. He reiterated that the respondent is a certified professional accountant and involved in other businesses. He therefore has the means to make good any loss that may arise from the execution of the decree.

Counsel further submitted that the applicant did not comply with the requirement to give security for the performance of the decree or order as may be ultimately binding upon him. That the sum of UGX 200,000 that he deposited as security for costs in this court is not meant to be in lieu for security for the performance of the decree. He opined that complying with the requirement to deposit security for the due performance of the decree would entail the deposit in this court of the amount of UGX 514,264,750 that is due on the decree on account of the principle amount claimed and interest thereon at the rate of 6% per annum. That the applicant therefore ought to deposit that amount or a bank guarantee or certificate of title to land before the order is granted.

He concluded that for those reasons, the application should be dismissed with costs, or in the alternative, that the applicant be ordered to deposit UGX 514,264,750 together with interest at the rate of 6% per annum, from 16th August 2021 to the date of the decision of the court in the application, as a condition for the grant of the order for stay of execution.

Determination

I have considered the submissions of counsel in this application, the facts that were stated in the affidavits in support of the application and that in reply, as well as the annexure thereto. I will first dispose of the objection by counsel for the respondent that due to the difference in the name of the applicant stated in HCCS No 312 of 2018 and that in the later proceedings, especially in the Notice of Appeal, the judgment debtor and the applicant are two different persons. That the applicant did not file a deed poll to show that he changed his name from that which was used in the suit in lower court. That as a result, he was not party to the suit in the lower court and therefore has no *locus standi* to bring this application; it should be dismissed with costs for that reason.

I observed that the applicant explained why he is known by different names and added that it was the respondent that caused the confusion. He filed a suit against him using his stage name Patrick Idringi Salvado instead of his formal name on his National Identity Card, Partrick Idringi Viera.

This court in **Election Petition Appeal No. 001 of 2021, Hashim Suleiman v Onega Robert**, considered a similar question in relation to a politician who had names on some of his academic qualifications that were different from the name under which he was nominated and voted into office. Finding in favour of the respondent in that appeal, this court *(Cheborion Barishaki, Musota & Madrama Izama, JJA)* held that:

> *"Failure to do a deed poll and subsequently have the register amended would not change the identity of the person. Using different names in different academic papers does not change the identity of anybody but only causes doubt as to whether the person who presents the papers is the same person named in the academic papers. Evidence can be led to prove that such a person is the same person as named in the academic*

papers or otherwise. Failure to do a deed poll would not nullify the academic papers or qualifications, as this can be established as a question of fact. The evidence of a deed poll or statutory declaration is therefore not the only evidence that can be used to prove that the person who sat for the academic qualification of A-level and whose names are stated in the certificate of education for the advanced standard is the same person who is nominated. It is simply a question of fact."

In this case, the applicant swore an affidavit in the lower court to verify that fact that he was one and the same person referred to by different names, used interchangeably. The court therefore did not dwell on the matter and went on to consider the substantive matter that was before it. I see no reason to dwell on it either, because I am satisfied by the contents of the affidavit that the applicant deposed on 22nd May 2023 in this application that he is the applicant, **"Idringi Patrick Viera"** and one and the same person as "**Patrick Idringi Salvado"** who goes by the stage name of "**Salvado**." He is known to the respondent as **Patrick Idringi Salvado**, a combination of part of his formal name and his stage name. The objection to the application on that ground is therefore overruled and I shall entertain the application.

The principles/criteria for the grant of orders to stay execution were re-stated in **Theodore Ssekikubo & Others v. Attorney General & Another, Constitutional Application No 06 of 2013,** as follows:

i. the applicant will suffer irreparable damage or the appeal will be rendered nugatory if the order is not granted
ii. the appeal has a likelihood of success; or a prima facie case of his right to appeal.
iii. If 1 and 2 above has not been established, the court must consider where the balance of convenience lies; and
iv. the application was instituted without delay.

I will consider the criteria above as the issues that have got to be determined in this application before an order for stay of execution is granted or denied.

Starting with the second criterion named above, a requirement of the Rules of this court, there is no doubt that there is an appeal pending hearing before this court as Civil Appeal No 214 of 2023. **Annexure F1** to the affidavit in support shows that the notice of appeal was received in this court on 11th or 17 May 2022. I say so because the stamp whereby receipt was acknowledged by the clerk was superimposed onto the title to the notice, making it difficult to see the date on which it was received. The application therefore satisfies the requirements of rule 6 (2) (b) of the Rules of this court as to the lodgement of a notice of appeal in the court before an application for stay of execution can be entertained.

With regard to the first criterion, the applicant proposes to appeal against the decision of Kakooza Sabiiti, J in which she denied the application to set aside the ex parte judgment and decree and to grant orders to stay execution of the decree for the recovery of a total sum of UGX 500m, interest thereon and the costs of the suit. The main reason that the applicant gives for his proposed appeal is that he did not appear on the day of hearing and as a result the suit proceeded in his absence, as well as the absence of his advocate. He claims this happened because his advocate at the time was negligent and neither pursued his defence in court nor informed him about the hearing date. Judgment therefore passed *ex parte*. I cannot tell whether the proposed appeal will be successful or not because the applicant did not indicate what the exact appeal is; he did not provide court with a copy of the memorandum of appeal.

However, he does have a right to appeal the decision in HCMA No 1315 of 2021 because it was a final order about the rights of the applicant in the head suit. It put an end to the dispute in the High Court between the parties. In effect, what he proposes to bring to this court is an appeal against the judgment and orders of the High Court in Civil Suit No. 321 of 2018. Such an order is appealable under the provisions of Order 44 rule 1 (c) for it is an order under rule 27 of Order IX rejecting an application for an order to set aside a decree passed *ex parte*. It is appealable as of right under section 76 of the Civil Procedure Act. The applicant has therefore satisfied the criterion of the *prima facie* case of his right to lodge an appeal in this court.

With regard to the 3rd criterion set out above, I need not consider it since the application satisfies criteria 1 and 2. I must therefore go on to consider the final criterion which his whether the applicant brought his application without delay. I note that the application to set aside the judgment and decree of Gaswaga, J was handed down on 29th March 2022. However, this application was filed in this court on 5th May 2023.

The applicant states that he filed this application because there was imminent danger of execution of the decree, the respondent having started on the process by filing Bills of Costs in the High Court for taxation. The Bills of Costs in HCCS No 321 of 2018 and HCMA 1315 of 2021 (**Annexure H"** to the affidavit in support of the application) show that they were lodged in the High Court on 26th October 2021. A taxation hearing notice was issued on 31st August 2022 for a hearing to be held on 12th October 2022 at 10.00 am. The applicant does not state that the hearing took place. I also observed that it is now more than 7 months since the hearing notice for the taxation was served on the applicant's Advocates, M/s Engoru Mutebi Advocates, on 25th

September 2022. There is no explanation for the delay in filing this application, which as I have already stated was filed on 5th May 2023, more than 7 months after that.

It will be recalled that the Notice of Appeal was lodged in this court on 11th May 2022. This court takes judicial notice of the fact that the proceedings in the High Court, especially the Commercial Division, are always recorded electronically and transcribed. It is therefore surprising that the applicant has demonstrated to this court that more than one year after he lodged his notice of appeal, he has not taken steps to file his memorandum of appeal in this court. In paragraph 9 of his affidavit in support he adverts to a memorandum of appeal having been filed in court but the date on which it was filed is strangely blank. I am therefore inclined to believe that the applicant is not vigilant in pursuing his right to appeal against the judgment, decree and orders that were passed against him in the lower court. There was definitely inordinate delay on the part of the applicant in bringing this application.

I also note that the applicant emphasises that he deposited UGX 200,000 in this court as security for the costs of the appeal, should judgment pass against him. However, the amount that may fall due as costs, should he lose the appeal, should be commensurate with the costs for the appeal, HCCS No 321 of 2018 and HCMA No 1315 of 2021. The sum UGX 200,000 that he deposited in this court is a paltry sum compared to what he may have to dole out, should he lose the intended, if he ever files it all. The Bills of Costs in the matters in the lower court show that the starting point for taxation is UGX 19,654,400 in HCMA No 1315 of 2021, and UGX 31,021,608 in HCCS No 321 of 2018, making a total of UGX 50,676,008 that should be taxed off to establish what would be due in the two matters in the lower court.

Counsel for the respondent argued that the applicant did not comply with the mandatory requirement to given security for the due performance of the decree. I believe his argument is based on the requirements for applications for stay of execution in the lower court which are provided for by Order 43 rule 3 (c). It provides as follows:

> **(3) No order for stay of execution shall be made under subrule (1) or (2) of this rule unless the court making it is satisfied—**
>
> **(a) that substantial loss may result to the party applying for stay of execution unless the order is made;**
>
> **(b) that the application has been made without unreasonable delay; and**
>
> **(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.**

There is no equivalent of rule 3 (c) of Order 43 in the Rules of this court. Instead, rule 6 (2) (b) of the Court of Appeal Rules, under which this application was brought, provides that 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 a stay of proceedings *on such terms as the court may think just.***

If any order is made for the due performance of the decree, it is only discretionary and issued as one of the terms that *"the court may think just."* Therefore, unlike the High Court which is limited under Oder 43 rule 3 (c) to ordering security for the performance of the decree, this court may impose such other terms as it deems just, including ordering that the appellant furnishes security for the performance of the decree in the lower court.

In addition, though the applicant did deposit in this court the sum of UGX 200,000, as it is required by rule 105 of the Rules of this court, the court may order for further security for costs in appeals as is shown in sub rule 2, below.

105. Security for costs in civil appeals.

(1) Subject to rule 113 of these Rules, there shall be lodged in court on the institution of a civil appeal, as security for costs of the appeal, the sum of 200,000 shillings.

(2) Where an appeal has been withdrawn under rule 94 of these Rules, after notice of appeal has been given, the court may, on the application of any person who is a respondent to the cross-appeal, direct the cross appellant to lodge in the court as security for costs the sum of 200,000 shillings, or any specified sum less than 200,000 shillings, or may direct that the cross-appeal be heard without security for costs being lodged.

(3) *The court may, at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal.*

Rule 113 of the Rules provides for the waiver of, or relief from fees and security for costs for indigent appellants, described therein as persons who on application satisfy the Registrar that they do not have the means to deposit security for costs or meet the costs of the appeal. The applicant here does not fall in that category of persons. He still wants to litigate with the respondent but is engaged in highly dilatory conduct since there is no evidence in this application that he lodged his memorandum of appeal in this court, more than one year after the decision in HCMA 1315 of 2021, in which he sought to have the judgment of that court set aside, was dismissed.

For those reasons, an order to stay execution of the decree of the High Court in HCCS 321 of 2018 shall issue and inure until final disposal of the appeal. However, the application shall deposit in this court the additional sum of UGX 50,000,000 (Uganda Shillings Fifty Million, only) being further security for the costs of the appeal.

In addition, if he has not yet filed the memorandum and record of appeal, as it appears to me from the facts stated in this application, he shall file the appeal within 30 days of the date of this ruling; except that it shall not be accepted by the Registrar unless he furnishes security for costs of the appeal, in the sum that I have ordered above. The costs of this application shall abide the result of the appeal.

Dated at Kampala this 30 day of May 2023.

Irene Mulyagonja

JUSTICE OF APPEAL