THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC- MA-0178 OF 2005
(Arising from HCT-00-CC-CS-0498-2002)

SEWANKAMBO DICKSON ::::::::::::::::::::::
APPLICANT

VERSUS

ZIWA ABBY ::::::::::::::::::::::::::::::
RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The Applicant seeks a Court order to stay execution of this Court's Judgment pending the Applicant's appeal to the Court of Appeal. The background to the application is not complicated and/or difficult to follow. The facts as established by this Court in HCCS No. 498/2002 are that the Applicant entered into an agreement with the Plaintiff for hire of the Respondent's vehicle. Payment was to be on a daily basis.

It would appear that the initial agreement was for a definite period. However, there appears to have been mutual extension of the period of hire.

The Respondent's case is that the Applicant made a down payment of Shs.140,000- (which under the agreement would only cover 2 days) and thereafter defaulted. The vehicle was later recovered from Arua where it had broken down. The Respondent's claim was therefore basically for the outstanding hiring charges and the towing expense from Arua to Kampala.

The Applicant admits the agreement of hire but disputes the alleged failure/refusal to pay the hire charges. He claims to have paid money to the Respondent which the Respondent later denied receipt thereof. My learned sister, M.S. Arach – Amoko J., believed the Respondent's version and disbelieved the Applicant's. The Applicant has filed a notice of appeal against that decision. He is yet to receive a copy of the proceedings and Judgment for purposes of formulating the grounds of appeal.

In the meantime, on 01/03/2005, the learned Registrar of this Court issued a notice to show cause why a warrant of arrest should not issue in execution. The warrant was handed over to the Court bailiffs. I don't know for what purpose this was done since until cause is shown to warrant the issuance of that order, the Applicant wouldn't be said to have disobeyed any order. The bill of costs had just been taxed. Be that as it may, on seeing the notice, the Applicant filed this application.

The application was brought under 0.39 rr 4 (2) and 5 and 0.19 rr 23 (3) and 26 of the Civil Procedure Rules. Although 0.39 applies to appeals to High Court where as the appeal herein is to the Court of Appeal, the law under which the application was brought was not subject of contention herein, rightly so in my view considering the Supreme Court decision in Lawrence Musiitwa Kyazze –Vs- Eunice Busingye SC Civil Application No. 18/90 in which their Lordships pointed out that the parties asking for a stay of execution should be prepared to meet the conditions set out in 0.39 r 4 (3) of the Civil Procedure Rules. I will therefore not comment further on that aspect of this matter.

I have also addressed my mind to the issue of the Applicant herein having lodged only the notice of appeal and not the appeal itself. Authorities appear inconsistent in this area of law, some stating that the lodgment of a notice of appeal is an intention to appeal and cannot amount to appeal that must be lodged by filing a memo of appeal, record of appeal, payment of fees and security for costs: G.M. Combined (U) Ltd –Vs- A.K. Detergents (U) Ltd HCCS No. 384/94 reproduced [1995] iv KARL 92 and others stating that the word appeal denotes the procedure started by filing a notice of appeal: See Ujagar Singh –Vs- Runda Coffee Estates Ltd [1966] EA 263, a decision of the former East Africa Court of Appeal. In the latter case, Sir Clement De Lestang, Ag. V.P. stated:

"…… It is only fair that an intended Appellant who has filed a notice of appeal should be able to apply for a stay of execution to the Court which is going to hear the appeal as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the Court below could cause him irreparable loss," at p.266.

I agree with the above reasoning. I think it is customary for applications for stay to be made to the Court that made the order being appealed from as soon as the notice of appeal is given. If the law were to be that before that is done there must be an appeal in existence, then few of such applications would succeed. I'm fortified in holding so by the Supreme Court decision in Lawrence Musiitwa Kyazze case, supra, where their Lordships stated:

"The practice that this Court should adopt, is that in general application for stay should be made informally to the Judge who decided the case when Judgment is delivered. The Judge may direct that a formal motion be presented on notice (under 0.48 r 1), after a notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done."

From the above, it is clear to me that a notice of appeal is sufficient. However, the parties asking for stay should be prepared to meet the

conditions set out in 0.39 r 4 (3) of the Civil Procedure. I will therefore consider whether this application meets those requirements.

Over the years, Courts have established three conditions for the determination of applications for stay of execution:

(a). that substantial loss may result to the Applicant unless the order of stay is made;

(b). that the application has been made without unreasonable delay; and

(c). that security for costs has been given by the Applicant.

In the instant application, the Applicant avers that substantial loss may result if execution proceeds in as far as the appeal would be rendered nugatory. The Applicant contends that the form of execution which has been applied for, i.e his arrest and detention in civil prison, is too oppressive. That as a businessman, his businesses will suffer and yet after the said imprisonment the appeal may be determined in his favour. Mr. Bamwite for the Respondent does not see any merit in that argument.

I have addressed my mind to the arguments of both counsel. I think in respect of this ground, the Applicant has a point. As the Court of Appeal emphasized in DFCU Bank Ltd –Vs- Dr. Ann Persis Nakate Lusejjere, Civil Application No. 29/2003 (unreported) 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.

The Respondent applied for the arrest and detention of the Applicant in a civil prison, a rather coercive way of enforcing payment of a debt. When the Applicant filed this application, the same Respondent volunteered information to Court vide his affidavit, para 11 thereof, that the Applicant is capable of settling the decretal amount because he has income generating projects in that he is a music promoter, with a music recording studio at the Old Taxi Park and Commercial buildings at Kabowa and Makindye. He has therefore been portrayed to Court as a propertied litigant with vast wealth. Now if the Applicant has all this wealth, it has not been indicated to me why the Respondent would wish to see him subjected to the rather unpopular and oppressive remedy of arresting him and having him detained in a civil prison instead of attaching and selling that property. At the hearing, the Applicant seemed to totally change his mind full circle on the Applicant's stated vast wealth. His counsel submitted from the Bar that in fact no such property exists. I am a little perturbed by that turn about of events considering that this is a sworn statement from the Respondent himself. While arrest and detention is one of the legitimate ways of treating a Judgment debtor, I'm not in the least convinced, in the circumstances of this case, that it is the most appropriate remedy. I would agree with his counsel that this would cause substantial loss to his client. As my brother Ogoola, J. (as he then was)

stated in Tropical Commodities Suppliers Ltd & Others –Vs- International Credit Bank Ltd (In liquidation), Misc. Application No. 379/2003, (unreported) and I agree, substantial loss is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal. There can be no doubt that a business person imprisoned in circumstances as herein would incur great loss in his business. In the event of a successful appeal, no amount of compensation would wash away that stigma, particularly so in a situation where he is not in contempt of any Court order since he has not exhausted his right of appeal. In these circumstances, I would find that the Applicant has satisfied the first requirement and I hold so.

As regards the second requirement, i.e that the application has been made without unreasonable delay, I notice that Judgment was delivered on 1/12/2004. On 3/12/2004, the Applicant lodged a notice of appeal. He immediately applied for a copy of the proceedings and Judgment which documents according to him are yet to be availed to him. He was not challenged on this. The bill of costs was taxed on Thursday 17th February, 2005 and immediately thereafter, i.e on Thursday 24/2/2005 a notice to show cause why warrant of arrest in execution should not issue was dispatched to the Court bailiffs. This must have been at the instance of the Respondent. A week later, the Applicant filed this application. Inspite of all these factors being in Applicant's favour, counsel for the Respondent has

argued that the Applicant delayed in filing this application. I'm unable to accept that argument. Save that he did not make the application for stay informally to the Judge who decided the case when Judgment was delivered, which is not a mandatory procedure, it does appear to me that he made the application without unreasonable delay.

The second requirement is also in Applicant's favour.

This leaves only the third requirement, i.e. payment of security. The Applicant has not offered any security. He has only undertaken to deposit such security for the due performance of the Judgment and decree as this Court shall order. The Respondent for his part seeks security of Shs.16,887,350- being the entire decretal amount. The law is not without confusion in this area. However, in Kampala Bottlers Ltd –Vs- Uganda Bottlers Ltd SC Civil Application No. 25/95, the Court stated that what is required is *'security for costs'*. The same position is seen in Lusejjere case, supra.

I notice that under 0.39 r 4 (3) (c), the Court should be satisfied that security has been given by the Applicant for the due performance of such decree or order as may ultimately be binding upon him. While the language above appears to embrace security for the entire decretal amount rather than merely security for the costs of the appeal, I'm of the considered view that

for the application to succeed, it is sufficient that the Applicant is willing to give security for costs, rather than security for the entire decretal amount as Mr. Bamwite for the Respondent pressed herein. The Court would necessarily determine the amount, depending of course on the circumstances of each case. As Court observed in Tropical Commodities Suppliers Ltd, supra and I associate myself with that view, insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts.

In that case, the decretal amount was Shs.200m. The Court imposed a sum of Shs.20m, a figure representing 10% of the said decretal amount. Considering the decretal amount involved herein, i.e. close to Shs.17,000,000- and doing the best I can in the circumstances of this case, I deem a sum of Shs.5,000,000- representing about one third of the decretal amount reasonable.

In the result, this application is allowed. The Applicant shall deposit a sum of Shs.5,000,000= in Court as security for the due performance of such decree or order as may ultimately be binding upon him. This amount, in cash, shall be deposited within 30 days from the date of this order, i.e. on or before 2nd May, 2005 (inclusive).

In default, this order shall lapse. In that event, the Respondent shall be at liberty to proceed with execution by way of attachment and sale of the Applicant's property, if any, unless cause is shown to the contrary. Each party shall bear his own costs herein.

Yorokamu Bamwine

J U D G E

01/04/2005