

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0521-2007  
(ARISING FROM HCT-00-CC-CA-09-2007)

UGANDA REVENUE AUTHORITY ..... APPLICANT

VERSUS

TEMBO STEELS LIMITED ..... RESPONDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application brought by Notice of Motion under Sections 27 and 28 of the Tax Appeals Tribunal Act, Order 52 of the Civil Procedure Rules and Section 98 of the Civil Procedures Act. The Applicant, Uganda Revenue Authority, is seeking orders that:-

- (i) Execution of the Decree in Tax Appeals Tribunal No. 22 of 2005 be stayed pending disposal of HCT-00-CC-CA-0009-2007
- (ii) Costs of this application be provided for.

The brief background to this application is that the Respondent M/S Tembo Steels Ltd on 7<sup>th</sup> November 2005 filed Application No. TAT 22 of 2005 against the Applicant before the Tax Appeals Tribunal. The Tribunal disposed of the application by ruling in favour of the Respondent. The Applicant on 15<sup>th</sup> June 2007 filed High Court Civil Appeal No. 9 of 2007 appealing against the ruling.

This application is supported by an affidavit deposed to by Moses Kazibwe Kawumi, an Advocate of the High Court and the Applicant's Assistant Commissioner – Litigation. He therein avers that the Respondent has filed a taxed bill of costs and is to demand Shs.18, 665,830/= as costs. That the Appeal has a very high likelihood of success and execution of the said Decree will render the Appeal nugatory and prejudice the Appellant's interest.

Section 28 of the Tax Appeals Tribunal Act states:

“(1) Where ---- an appeal against the decision of a tribunal has been lodged with the High Court, the reviewing body may make an order staying or otherwise affecting the operation or implementation of the decision under review or appeal or a part of the decision, as the reviewing body considers appropriate for the purposes of securing the effectiveness of the proceedings and determination of the application or appeal.

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(3) In this section “reviewing body” means –

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(b) In the case of an appeal to the High Court, the High Court”

The section gives the High Court discretionary powers to stay the operation or implementation of the Tribunal's decision or part thereof pending the disposal of the appeal. While exercising its discretion to stay or not stay execution court is required to consider whether a stay of execution is appropriate or not for the purposes of securing the effectiveness of the proceedings and determination of appeal. See: *Uganda Revenue Authority Vs Uganda Communications Commission HCT-00-CC-CA-No: 11 of 2006*

Ms Anne Bitatule, counsel for the Applicant, submitted that the applicant's appeal has a high likelihood of success and argued that execution of the decree by recovery of the taxed costs in the sum of Shs18,665,830/= would render the appeal nugatory and prejudice the applicants

interest in the event the appeal was decided in the applicant's favour. That the Applicant's problem was realising the recovery of the above sum in case the appeal is successful. Counsel referred to Nganga Vs A Kimain (1969-1993) HCB 82, and Francis Mansio Micah Vs Nuwa Walakira (1992-1993) HCB 88

In Nganga Vs Kimani (Supra) Justice Harris of the High Court of Kenya stated:

“In the present case it is clear that the plaintiff, as holder of the decree, is or may be in a position to proceed hereunder in such away that substantial loss might result to the defendant notwithstanding that the decree may perhaps ultimately be set aside. This is precisely one of the situations for which in principle the granting of the stay of execution is intended to provide --- ----“.

In Mugenyi Vs NIC (above) the Court of Appeal stated that it is well established that the High Court has inherent Jurisdiction under section 101 (now section 98) of the Civil Procedure Act to stay any of its orders pending appeal. That since the High Court has power to stay execution of any of its orders either in the exercise of its inherent jurisdiction or under Order 39 rule 4 (now order 43) it follows that a like jurisdiction is conferred on the Court of Appeal by section 40(2) of the Judicature Act. In Micah Vs Walakira (above) the Supreme Court held that the High Court has inherent jurisdiction under section 101 (now 98) of the Civil Procedure Act to grant a stay of its own decree pending an appeal. That there are many cases where the High Court may need to order a stay and one such case, may be to preserve the status quo pending an appeal. Their Lordships also observed that Court must have control over its own proceedings and decisions to meet the interests of justice.

Where the circumstances of the case show that execution of the decree if not stayed may render the appeal nugatory in the event the appeal succeeds, that would be evidence to show that execution pending appeal might have a negative bearing to the effectiveness of the proceedings and the determination of the appeal. If court so finds then it would be appropriate for it to exercise its powers of stay pending appeal pursuant to section 28 of the Tax Appeal Tribunal Act.

Akullo – Addo JSC and Chief Justice of Ghana in Joseph Vs Jebeille (1963) 1 GLR 387 (quoted and commended to Judges by the Court of Appeal in DFCU Bank Ltd Vs Dr . Ann Persis Nakate Lusejjere C.A.C App No. 29 of 2003) stated:

“Any situation created by a judicial act, done either inadequately or callously, which makes it impossible for a successful appellant to recover money paid, or any interest in property or other legal rights surrendered under a judgment vacated on appeal does a disservice to the course of justice, if only because it undermines public confidence in the administration of justice.”

In his submission Mr. Birungi Counsel co-appearing with Mr Enoch Barata for the Respondent, urged this Court when determining what could be harmful to the appeal to be guided by the decisions of the Court of Appeal and Supreme Court to the effect that Court can only grant a stay of execution if there are special circumstances and good cause to justify a stay. Counsel cited DFCU Vs Lusejjere (Supra), The Editor in Chief the New Vision Newspaper Vs Jeremiah Ntabgoba C.A.C. App No. 63 of 2004 and Kampala City Council Vs National Pharmacy Ltd (1979) HCB 215.

In the Editor in Chief The New Vision Newspaper Vs Ntabgoba (supra) the court of Appeal held that the Court can only grant a stay of execution if there are special circumstances and good cause to justify that course. The court further held:

“However, inability of the victorious party to be able to refund the decretal amount in the event of a successful appeal if proved, constitutes a special circumstance which justifies grant of a stay of execution. The burden to prove this is in the applicant who wants Court to believe that the victorious party is not likely to be able of refunding the decretal amount in the event of successful appeal.”

This is in line with section 103 of the Evidence Act which states:-

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person”

Ms Batature argued that the taxed costs were payable to the Respondent’s lawyers. That the applicant’s counsel have no opportunity to claim instructions fees. The applicant was therefore doubtful that the Respondent would be able to pay up the money in the case the appeal is successful.

Mr Birungi submitted that the Applicant had failed to discharge the burden cast upon it to prove that the Respondent is unlikely to be able to refund the money paid as taxed costs or restore the appellant to the status quo ante in the event of a successful appeal. Counsel contended that on the other hand the Respondent had adduced sufficient evidence as proof of its ability to pay.

All that is stated in the affidavit in support of this Application is:

“6. That the Appeal has a very high likelihood of success and execution of the said Decree will render the Appeal nugatory and prejudice the Appellants interest.”

Pendency of an appeal is not a bar to a successful party’s right to enforce a decree obtained even by execution. See *National Pharmacy Ltd Vs Kampala City Council (1979) HCB132*. It is also immaterial whether the appeal will succeed or fail. See *DFCU Vs Lusejjere* (above). The applicant’s affidavit does not show how the execution will render the appeal nugatory or how it will prejudice the appellant’s interest.

The Respondent filed an affidavit in reply deponed to by Mr. Enoch Barata, Counsel for the Respondent. I will reproduce paragraphs 8, 9, and 10 where Mr. Barata avers.

“8. That I am aware and have also been informed by Mr Shiayan Agarwal and Director of the Respondent that the Respondent would in any event be capable of repaying the costs in the event that the appeal succeeded.”

9. That the Respondent has previously demonstrated ability and capability to pay earlier when required to pay 30% deposit on taxes in dispute before commencement of the application before the Tax Appeals Tribunal when shs147,522,612 (one hundred forty seven million five hundred twenty two thousand six hundred twelve shillings) was paid as a pre-condition to the suit.

10. That I am aware that the Respondent is in the business of steel products manufacturing and has two steel rolling mills at Lugazi and at Mukono.”

The above averments on oath as to the Respondent’s financial abilities have not been contradicted by any evidence. The sum which is subject to execution is only shs18, 665,830/= compared to Ss 147,522,612/= which the Respondent was able to deposit as a pre-condition to the suit before the Tribunal.

With the above uncontradicted evidence the respondent has shown its ability and, willingness to pay in the event of a successful appeal. In my view, the Applicants appeal, if successful, will not be rendered nugatory and the execution of the decree will not have a negative effect to the appeal since the Respondent will be able to restore the applicant to the status quo ante.

In the final result this application is dismissed with costs to the Respondent.

Hon. Mr. Justice Lameck N. Mukasa

Judge

19<sup>th</sup> October, 2007