

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

**HCT-00-CC-MA- 086-2006
(Arising out of HCT-00-CC-667-2003)**

PAN AFRICAN INSURANCE COMPANY (U) LTD . APPLICANT

VS

INTERNATIONAL AIR TRANSPORT ASSOCIATIONRESPONDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion under section 98 of the Civil Procedure Act, Order 48 rule 1 of the Civil Procedure Rules. The Applicant, Pan African Insurance Company (U) Ltd, who is the judgment debtor in H.C.C.S. No. 667 of 2003, is seeking orders that:-

- (a) The execution of the Decree against the Applicant in HCCS No. 667 of 2003 be stayed.
- (b) The costs of this application be provided for.

The grounds for the application are that:-

1. The Applicant has a pending appeal in the Court of Appeal against the judgment in H.C.C.S No. 667 of 2003.

2. If execution of the Decree is not stayed, the applicant will suffer substantial loss.
3. The application for stay of execution has been made without unreasonable delay.
4. The appeal has a reasonable likelihood of success as there are matters of substance and merit upon which the appeal against the decision of the High Court in HCCS No 667 of 2003 is based.
5. The applicant is ready to obey orders of Court as to security for the due performance of the decree as may ultimately be binding upon it.
6. It is just, equitable and in the interest of justice that the applicant/judgment debtor be granted a stay of execution.

Representation was Ms Florence Kabenge for the Applicant and Mr. Andrew Kibaya for the Respondent.

The background to this application is that the Applicant filed H.C.C.S. No. 667 of 2003 against the Respondent, International Air Transport Association, seeking to recover US\$75,000, as payment made in error under a guarantee, interest and costs. The Respondent counter-claimed for US\$31,767 being the balance owed by the Applicant on the guarantee, general damages for breach of the contract of guarantee, interest and costs. In its judgment delivered on 25th January 2008, this Hon. Court dismissed the Applicant's suit and held in favour of the Respondent on the Counter – claim. This application is supported by an affidavit sworn by Ms Maria Odido, the Managing Director of the Applicant Company. She therein avers that the appeal has a reasonable likelihood of success as there are matters of law, substance and merit which the appellant court shall be

asked to decide. That if execution of the Decree is not stayed the Applicant/Judgment debtor will suffer substantial loss and the decision of the Court of Appeal will be rendered nugatory.

The Respondent filed an affidavit in Reply deponed to by Mr. Byrad Sebuliba an advocate practicing with M/S Shonubi, Musoke & Co Advocates the firm of lawyers representing the Respondent. He therein contends that the Applicant does not show that it will suffer substantial loss if the application is not granted. That the Applicant does not show that the Respondent will not be able to restore it to the status quo ante if its appeal in this suit succeeds by a refund of the money received by the Respondent in execution of the Decree. In paragraphs 4 he avers that the Respondent is an association of international airlines, a going commercial concern and able to refund any amount of money received by it to the Applicant if the Applicant's appeal succeeds. Further that the Applicant has not furnished security for the due performance of any decree that may ultimately be binding upon it. He also argues that the Applicant has not shown how the appeal has a likelihood of success.

This application is brought under section 98 of the Civil Procedure Act. The Supreme Court has in several cases held that it is well established that the High Court has inherent jurisdiction under the section to grant a stay of its own decree pending an appeal. See Mugenyi & Co Advocates Vs N.I.C. Civil Appeal No:13 of 1984, Francis Mansio Micah Vs Nuwa Walakira (1992 – 1993 HCB 88.

It is now settled that Court can only exercise the discretion to grant a stay of execution if there are special circumstances and good cause to justify a stay. The inability of the victorious party to be able to refund the decremental amount in the event of a successful appeal is one of such special circumstances if proved. The Applicant has not adduced any evidence to show that the Respondent will not be able to restore it to the status quo ante if its appeal succeeds. On the part of the Respondent it is deponed on oath that it will be able to refund any amount of money received by it if the Applicant's appeal succeeds. The above averment has neither been denied nor rebutted. The presumption is that it is admitted as a true fact. See Massa Vs Achen (1978) HCB 297. So the Applicant's appeal if successful, will not be rendered nugatory because the Respondent will be able to restore it to the status quo ante. See Editor – Chief the New Vision Newspaper Vs Jeremiah Ntabgoba Court of Appeal Civil Application No. 63 of 2004.

The Application merely states that if the decree is not stayed the Applicant will suffer substantial loss. The deponent should have gone a step further to lay the basis upon which Court can make a finding that the Applicant will suffer substantial loss as alleged. The Applicant should go beyond the vague and generalised assertion of substantial loss in the event a stay order is not granted. In the Tanzanian Case of Tanzania Cotton Marketing Board Vs Cogecot Cotton Co SA (1995 – 1998) IEA 312 Lubuva JA cited with approval the Indian case of Bansidhar Vs Pribku Dayal AIR 41 1954 where it was stated:

“It is not enough merely to repeat the words of the code and state that substantial loss will result; the kind of loss must be specified, details must be given and the conscience of the Court must be satisfied that such loss will really ensure.”

It was further observed:-

“The words substantial cannot mean the ordinary loss to which every judgment –debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, It is clear the words ‘substantial loss’ must mean something in addition to all different from that.”

As to the pendency of an appeal and its likelihood of success, in *Uganda Revenue Authority Vs Tembo Steels Ltd HCT-00-CC-MA-0521-2007*, I held that pendency of an appeal is not a bar to a successful party’s right to enforce a decree obtained even by execution. Further that it is also immaterial whether the appeal will succeed or fail. See also *National Pharmacy Ltd Vs Kampala City Council (1979) HCB 132.* *DFCU Bank Ltd Vs Dr. Ann Persis Nakate Lusejjere C.A.C. App No. 29 of 2003.*

In the *Editor in Chief The New Vision Newspaper Vs Ntabgoba* (above) the Court of Appeal held that such things as likelihood of the intended appeal succeeding and willingness of the Applicant to deposit security for the

performance of the decree or order are not legal requirements for consideration whether or not to grant a stay of execution.

Considering all the above this Application is dismissal with costs.

Hon Mr. Justice Lameck N. Mukasa
Judge
28/03/08