

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0521-2008
(ARISING FROM HCT-00-CC-CS-1471-1999)

PETER MULIRA APPLICANT

VERSUS

MITCHELL COTTS LTD RESPONDENT

BEFORE: HON. JUDGE LAMECK N. MUKASA

RULING:

THIS is an application by Notice of Motion whereby the Applicant, Mr. Peter Mulira, seeks an order for stay of execution in HCT-00-CC-CS-1471-1999 until the disposal of proceedings to reinstate HCCS No 424 of 2004.

The grounds for the application are:

1. The Applicant has instituted proceedings to reinstate HCCS No 424 of 2004

2. HCCS No 424 of 2004 seeks to set aside the consent judgment and decree in HCCS No 1471 of 1999.
3. The real plaintiff in HCCS No 1471 of 1999 has no interest in the execution.
4. It is just and fair to stay the execution.

When the application came up for hearing Mr. Peter Walubiri, Counsel for the respondent, raise two preliminary points of law. First that the Applicant could not bring an application for stay of execution of the main suit until he sets aside the consent judgment as it is binding on him. Counsel cited Peter Mulira Vs Mitchell Cotts Ltd. CACA No 15 of 2002.

The above Court of Appeal case is good law that parties to a suit are bound by their consent judgment. Hon. Justice Kituba, JA stated:-

“The law regarding consent judgment is that parties to a Civil Suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still the Court has to sign that judgment. A Consent judgment may not be set aside except for fraud, collusion or for ignorance of material facts. See Brooke Bond Liebig (T) Ltd Vs Mallya (1975) EA 266.”

Once a consent judgment is recorded or endorsed by court it becomes the courts judgment out of which a decree for execution is extracted. Any judgment unless set aside is binding on the parties. Order 22 rule 26 of the Civil Procedure Rules, however, provides:-

“Where a suit is pending in any court against the holder of the decree of the Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or

otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

The Civil Procedure Act defines “suit” to mean “all civil proceedings commenced in any manner prescribed.”

Therefore a miscellaneous application is also a suit. In paragraph 3 of his affidavit in support the Applicant avers:-

“THAT I have instituted proceeds to reinstate HCCS No 424 of 2004 to challenge the said decretal amount and the said suit is still pending in the Civil Division of the High Court.”

It is not disputed that an application by the Applicant against the Respondent, is still pending in the Civil Division of the High Court. The Respondent is the holder of the decree which is the subject of this application, and the application before the Civil Division Court is in the name of the Applicant against whom the decree was passed. A party against whom a consent judgment or decree has been recorded can apply for a stay of its execution if he has a suit in his name against the consent decree holder.

Secondly, in paragraph 6 (d) of the Respondent’s Affidavit in reply it is averred that there are pending applications for stay of execution in the Civil Division Court. Mr. Walubiri referred to section 6 of the Civil Procedure Act. The section provides.

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim litigation under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to the relief claimed.”

I agree with Mr. Walubiri that the provisions of that section are mandatory and where the existence of such a previously instituted suit has been proved the court has no alternative but to stay the subsequent proceedings before it.

Annexure I to the Respondent's affidavit is a Notice of Motion issued on 19th September 2008 as Miscellaneous Application No 427 of 2008 arising from Civil Suit No 424 of 2004. That Application, is inter alia, for an order that:

“(a) Execution herein be stayed until the disposal of the application for reinstatement of *HCCS No 424 of 2004 – Peter Mulira V- Mitchell Cotts Ltd.*”

Civil Suit No 424 of 2004 is a Civil Division Court re-numbering of the originally Commercial Division Court Civil Suit No 370 of 2004 which was filed to set aside a consent judgment in Commercial Division Court Civil Suit No 1471 of 1999.

The parties to this application are exactly the same as in the previously filed Misc. App No 427 of 2008. The issue in Misc. App. No 427 of 2008 is whether to stay execution pending the disposal of the application to reinstate HCCS 424 of 2004. The execution to be so stayed is that of the Decree in Civil Suit No 424 of 2004. The Order or Decree to be executed is annexure A to the Respondent's affidavit which is the dismissal of that suit under Order 17 rule 6 of the Civil Procedure Rules.

The instant application is seeking stay of execution in HCCS No 1471 of 1999 pending the disposal of the proceedings to re-instate HCCS No. 424 of 2004. The issue in the instant application is whether to stay the execution of the consent decree in HCCS No 1471 of 1999. An Order staying execution of CS No 424 of 2004 does not automatically stay execution of Civil Suit No 1471 of 1999. Similarly stay of execution of Civil Suit No 1471 of 1999 does not automatically stay execution of Civil Suit No 424 of 2004. Though the final decree in Civil Suit No 424 of 2004 will affect the Consent Decree in Civil Suit 14 71 of 1999, whether affirmatively

or otherwise, the order in Misc application No 427 of 2008 will only affect the execution of HCCS No 424 of 2004 and the order in the instant application will only affect execution of HCCS No 1471 of 1999. The two applications are independent of each other.

The preliminarily objections are accordingly rejected and dismissed with costs. Hearing of the application will proceed on merit.

Hon Mr. Justice Lameck N. Mukasa

JUDGE

3rd June 2009