THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MA - 715 of 2009

PETER MULIRA :: APPLICANT/ PLAINTIFF

VERSUS

MITCHELL COTTS LTD :::::::::::::::::::::::::::: RESPONDENT / DEFENDANTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application brought by Motion under Section 98 of the Civil Procedure Rules (CPA) Order 22 rule 26; Order 50 rules 1 and 3 and Order 52 rule 1 of the Civil Procedure Rules (CPR).

The motion seeks orders that

1- The execution (in Civil Suit 1471 of 1999) be stayed pending disposal of the suit.
2- Costs.

The grounds for the motion are stated to be

1- That the Applicant instituted a Civil Suit against the Respondent in Civil Suit No. 467 of 2009 to set aside the consent decree dated 26th day of August 2009.
2- That the case has a high probability of success.
3- That if execution is not stayed the Applicant will suffer irreparable damage that cannot be atoned for.
4- That it is in the interest of justice that execution be stayed.

The motion is supported by the affidavit of the Applicant Mr. Peter Walubiri and opposed by the affidavits of Mr. Mohsen Mousavi a director of the Respondent company.
Mr. Deus Byamugisha appeared for the Applicant while Mr. Peter Mulira appeared for the Respondent.

The application arises from a Consent Decree entered into by the parties dated 26th August 2009 before me. The Consent Decree settled a long outstanding dispute between the parties in the courts involving High Court Civil Suit No. 1471 of 2009; Miscellaneous Application 426 of 2008; Miscellaneous Application 428 of 2008; Miscellaneous Application 357 of 2009 and Miscellaneous Application 364 of 2009.

The Decree which was in full and final settlement of all the above mentioned actions was for the sum of Ug.Shs.540,000,000/= payable in two installments of Ug.Shs.270,000,000/= on or before the 30th November 2009 and 27th February 2010. When the terms of this settlement were not honoured, the Respondent then sought enforcement by way of execution. The Applicant in the meanwhile has also taken further action by filing High Court Civil Suit No. 467 of 2009 to set aside the Decree in High Court Civil Suit 1471 of 1999.

Counsel for the Applicant challenged the consent Decree. He began by raising three broad areas of challenge namely;

1- That the Applicant owed the Respondent Ug.Shs.540,000,000/= whereas not.

2- That the Applicant signed the Consent Decree without the advise of his Counsel who had all the correct information and thereby fell into a trap.

3- That the Applicant signed the Decree with the wrong party.

Counsel for the Applicant submitted that if there were any monies to be paid then those were the Applicant's fees only.

Counsel for the Applicant further submitted that the Applicant had deponed that the Mediator and myself the Judge had pressured him to sign the consent decree and therefore no valid

agreement could flow from such pressures. Counsel for the Applicant relying on what was deponed submitted that this was evidence of coercion and that is why a suit had been filed to set aside the said consent decree under Order 22 rule 26 of the CPR. However, before that, it was necessary to stay execution, so that the Applicant did not suffer irreparable damage.

He submitted that the court had inherent powers to stay execution. In this regard he referred me to the decision of **Justice Tsekooko** (as he then was) in

> **Norah Mayanja V Habre International Trading Company Ltd** [1988 – 1990] HCB 163.

and the Supreme Court decision of **Mugenyi & Co. Advocates V NIC** CA 13 of 1994. In so granting, a stay of execution Counsel for the Applicant submitted that the court had to look at the totality of the proceedings.

Counsel for the Applicant further submitted that court could stay execution if the justice of it, so required. In this regard, he referred me to the case of

> **Harnam Singh & Ors V Mishri [1971]** EA 122 (CAK)

He further submitted that in a case such as this all that was required was for the Applicant to show that he had filed a suit which he had done.

He went to great lengths to argue that at this stage of the proceedings, court is not to concern itself with the merits of the intended suit but rather whether a stay of execution should be granted.

He also submitted that the applicant raised constitutional issues. Counsel for the Applicant submitted that Article 28 of the Constitution 1995 provided that a person shall be entitled to a fair and speedy and public hearing before an independent and impartial court or tribunal established by law. He submitted that the mediation carried out by Mr. John Napier (the Mediator designated by the court) did not meet that standard or that of a fair hearing under Article 44 (c) of the Constitution. He suggested that the conduct of the Mediator was wanting.

Counsel for the Respondent in reply prayed to court to dismiss the motion.

He submitted that the legal authorities/cases cited by Counsel for the Applicant related to stay of execution pending appeal to the Court of Appeal or the Supreme Court under Section 98 of the Civil Procedure Act. Counsel for the Respondent submitted that Order 22 rule 26 upon which this motion was based is different in its application. He however conceded that under both provisions of the law the court must look at the interests of justice.

Counsel for the Respondent submitted that it would be stretching it too far to find that because one has filed a new suit or an appeal that a stay of execution had to be granted. He agreed with Counsel for the Applicant that court had to look at the totality of the application to see whether a stay of execution ought to be granted.

Counsel for the Respondent submitted that court had a wide discretion, subject to terms such as security, to grant a stay.

He however submitted that the said suit had no chance of success and was a desperate attempt to deny justice to the Respondent/Judgment debtor. It was therefore an abuse of court process.

Counsel for the Respondent denied that the Applicant made a mistake to sign the consent because the figure of Ug.Shs.540,000,000/= was wrong. He submitted that this was an old argument relating to calculations and figures that the Applicant recycled in cases. He submitted that the figure he signed in the consent was lower than what was being claimed by Respondent as a result of the mediation process.

Counsel for the Respondent submitted that the Respondent did not make a mistake to sign the consent without legal counsel. This is because he was never denied counsel by court but consciously came robbed in court to represent himself. He also dismissed the allegation that the Applicant signed the consent with the wrong party and said that the affidavit of Mr. Mousavi properly indicated the various changes in the Respondent's corporate names.

As to coercion Counsel for the Respondent points to two specific allegations. First, that the Applicant was threatened with a warrant of execution which he disputes because at the time of signing the consent, there were no ongoing execution proceedings. Secondly, on the allegation of coercion by the Mediator which Counsel for the Respondent called this an unfortunate

allegation. He submitted that the Mediator accorded all the parties equal and fair treatment. He further submitted that when the consent was signed before me, it was a happy moment for all as the parties shook hands. He stated that the whole process was finalized and concluded in court and not before the Mediator.

Counsel for the Respondent dismissed the arguments founded on Articles 28 and 44(c) of the Constitution. He submitted that the parties had struggled in court with this dispute for ten years and that court guided by Article 126 (1) (d) promoted reconciliation between the parties to reach a settlement, that was signed.

Counsel for the Respondent submitted that if the second suit succeeded to set aside the consent judgment then the original decree of 22nd November 2000 for UK Pounds $216,151 (plus interest of 10% p.a.) would be reinstated which decretal amount was now about Ug.Shs.1,300,000,000/= which was above the settlement amount. He questioned the logic of this.

He submitted that if court was inclined to grant the stay of execution then terms should be set such as the deposit of the Ug.Shs.540,000,000/= in court.

I have perused the motion and the affidavits for and against it. I have also addressed my mind to the submissions of both Counsel for which I am grateful.

This motion is for stay of execution based on Order 22 rule 26 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act.

It is a settled position of the law and both Counsel seem to agree here that Court has inherent power to stay execution. There are plenty of decided authorities on the issue of stay of execution especially where there is a pending appeal from the decision. The question only remains as to what tests have to be applied. The Supreme Court in the case of

> **National Union of Clerical, Commercial and Technical Employees V National Insurance Corporation (NIC)** CA 17 of 1993 (SC)

held

> *"…The question whether a court should invoke its inherent powers in a given case is a matter of the courts discretion to be exercised judicially and the availability of an alternative remedy or specific provisions is only one of the factors to be taken into account, but does not limit or remove the court's jurisdiction…"*

So clearly the exercise of the power to stay execution based on the courts inherent powers is one of judicial discretion.

Section 98 of the Civil Procedure Rules provides

> *"…nothing in this Act shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of court process…"*

It would appear to me that in the exercise of the courts inherent powers is the pivotal test of meeting the ends of justice on the one hand and prevention of the abuse of process of the court. In this regard the powers of the court are wide. In the case of

> **Imelda Nandaula V UGADEV Bank Ltd** HCCA No. 47 of 1992

Byamugisha J (as she then was) further in addition to the test of justice, the principle of law to be followed in applications to stay execution is whether substantial loss would arise from not granting the same.

In this particular motion, the main ground is that the Applicant has instituted H.C.C.S No. 467 of 2009 involving the same parties to set aside the consent decree dated 26th August 2009.

Counsel for the Applicant in this regard relied on Order 22 rule 26 of the Civil Procedure Rules. In the case of

Oryema Boniface V UMSC HCCS 1238 of 1988

Okello J (as he then was) held that where an application is covered under Order 19 rule 26 (now Order 22 rule 26) then there was no need for court to apply its inherent jurisdiction under Section 101 of the CPA (now S. 98). Order 22 rule 26 of the CPR provides

"…Where a suit is pending in any court against the holder of a 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…"

Is there decree in this case involving the parties? The answer is; yes, for there is a decree dated 26th August 2009. Is there a suit against the holder of the decree in the name of the person against whom the decree was passed? The answer is; yes. There is H.C.C.S 467 of 2009 filed on the 14th December 2009. How then does Order 22 rule 26 work? I find that the most detailed discussion of the rule is found in the Tanganyika case of

Iddi Halfani V Hamisa Binti Athuman [1962] EA 761

In that case, Order 21 rule 29 which is equivalent of our Order 22 rule 26 was considered. Sir Ralph Windham (CJ as he then was) held at P. 763 that the said Order

"…impose(s) no condition regarding the nature of the pending suit or the effect of a stay of proceedings granted under the rule as regards adjustments of claims or prevention of multiplicity of execution proceedings. All that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed…"

In that particular case a cross-suit had been filed alleging that an ex-parte judgment had been obtained by fraud.

However, **Windham CJ** at P. 764 goes on to place a test that

> *"…the likelihood or even possibility in law of the cross suit being successful, upon the materials before court at the hearing of the application, must be a relevant factor in deciding whether the discretion should be exercised upon terms or at all…"*

In this particular situation, the cross suit alleges both fraud and coercion. Counsel for the Applicant submitted on both of these though he did not say much about fraud. Does the Applicant's cross suit stand a likelihood of success? The status of a consent decree as a general rule is firmly protected by law. In the case of

> **Attorney General & Anor V James Mark Kamoga & Anor** CA 8 of 2004 (SC)

Justice Joseph Mulenga (JSC as he then was) held

> *"…It is a well settled principle therefore, that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment…"*

That being the situation, one must look more to the consent itself rather than the original legal dispute between the parties. This of course places a higher burden on the Applicant/Plaintiff than would be in normal cases as in principle a consent has to be upheld. Counsel for the Respondent has taken the view that the suit cannot succeed and that the Applicant is making a desperate attempt to deny justice to the Respondent judgment debtor.

In the case of **Iddi Halfani** (supra) **Windham CJ**, (while following the case of **Flower V Lloyd** (5) (1879), 10 ch. D 327 at 333), cautioned against judgments being set aside by fresh actions as litigation would turn out to be endless. In the instance of an allegation of fraud, the

learned Judge held that the fraud must be extrinsic or collateral to the evidence given in the case.

I agree with that observation and add that; if the fresh action is based on the same facts as the one being challenged, then it must raise matters that were not apparent on the fact of the record of the challenged action. This would help avoid an abuse of court process through multiplicity of suits. This court will bear this in mind when reaching its final ruling in this matter.

As to the constitutional argument raised by Counsel for the Applicant that mediation does not meet the standards set for a fair trial in Articles 28 and 44(c) of the Constitution, I respectfully disagree. In enforcing the constitutional rights of parties, courts are specifically empowered under Article 126 (1) (d) to promote reconciliation of parties and this can be done through ADR (Alternative Dispute Resolution as it is known today) which includes mediation. In this regard therefore, I agree with the submission of Counsel for the Respondent.

All in all, this court is empowered to exercise its discretion to stay execution. Taking into account the above authorities, the nature of a consent judgment and the nature of the cross suit in this matter as outlined above, I will allow the stay of execution upon terms. I accordingly order that

1- Execution be stayed pending disposal of the suit on condition that

   (i) The Applicant deposit into court the sum of Ug.Shs.540,000,000/= or security sufficient to cover that amount acceptable to the Registrar of this court.

   (ii) That this be done within a period of 60 days from the date of today's ruling.

2- That costs abide the outcome of the main suit.

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Geoffrey Kiryabwire

JUDGE

Date: 10/03/2010

10/03/2010

12:30

Ruling read and signed in open Court in the presence of:

- D. Byamugisha for Applicant
- Karemera h/b for P. Walubiri for Respondent
- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 10/03/2010