**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL COURT DIVISION**

**HCT-00-CC-MA-467 -2013**

***(Arising from CIVIL APPEAL NO. 11 OF 2013)***

***(All Arising from the Chief Magistrates' Court Mengo Civil Suit No. 1062 of 2010)***

**ANDREW KISAWUZI::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**DAN OUNDO MALINGU::::::::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This application was brought under Order 43 rule 1 and 4, Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA). The applicant is seeking for an order for stay of execution in Civil Suit No. 1062 of 2010 pending the appeal and that provisions be made for costs of the application. The application is supported by an affidavit sworn by Mr. Andrew Kisawuzi, the applicant.

The grounds of the application as contained in the notice of motion and affidavit in support are that; the judgment and orders have been entered and

made against the applicant in Civil Suit No. 1062 of 2010 and the applicant is dissatisfied by the orders made therein and seeks to appeal against the decision of the Chief Magistrate at Mengo, the applicant has filed a notice of appeal and requested for proceedings which are not yet ready, the applicant/appellant has a high likelihood of succeeding in the appeal, the application has been made without any unreasonable delay, the respondent has a taxed bill of costs and has initiated execution process, the appeal shall be rendered nugatory if the decree is executed, justice demands that the execution of Civil Suit No. 1062 of 2013 be stayed pending appeal and lastly that it is in the interest of justice that this application be allowed.

An affidavit in reply deposed by Mr. Dan Oundo Malingu, an advocate and the respondent in this matter is on court record. The gist of his response is that the application is legally untenable, incompetent and devoid of any merit. The respondent also averred that he was prepared to promptly and unconditionally refund such monies as may be recovered in the process of execution should the applicant's appeal succeed.

At the hearing of this application, Mr. Omongole Richard represented the applicant while Mr. Gadala Fred represented the respondent. Upon the directions of this Court, counsel for both parties filed written submissions which are considered in this ruling. In his submissions the applicant's counsel referred to Section 98 of the Civil Procedure Act and the case of ***Afaro vs Uganda Breweries Ltd [2008] ULR 154*** where it was held that the court has inherent powers to grant such orders as may be necessary for the ends of justice including a stay of execution and argued that this court is vested with inherent powers to order a stay of execution. He referred to Order 43 of the CPR for the conditions under which courts can stay execution and submitted that there is

sufficient cause and arguable issues to be canvassed in the intended appeal. It was contended for the applicant that there is sufficient cause to enable this court to stay execution since the applicant had already filed Civil Appeal No. 11 of 2013 and the appeal would be rendered nugatory if the order sought in this application is not granted as the appeal has a real prospect of success.

Counsel for the applicant further argued that substantial loss will result if the application is not granted according to Order 43 r 4 (3) (a) of the CPR and referred to the case of ***Eriab Kabigiza vs Lawrence Sserwanga [1975] HCB 99*** for the holding that the main criterion for staying execution should be whether the judgment debtor would suffer substantial loss if the decree was executed notwithstanding that the decree might subsequently be set aside. He also cited the case of ***Hwan Sung Industries Ltd vs Tadjin Hussein SCCA No. 19 of 2008*** for the position that for a stay of execution to be granted, there should be a serious threat of execution before the hearing of the main application. In that regard it was contended for the applicant that the respondent has already filed and taxed a bill of costs in order to execute the decree in Civil Suit No. 1062 of 2010. He argued that this shows that there is real threat of execution before the appeal is heard and sufficient loss would occur if the respondent executes the decree.

It was submitted further for the applicant that this application was made without unreasonable delay as required by Order 43 r 4 (3) (b) of the CPR since the applicant filed both the appeal and the instant application immediately the lower court delivered its decision. The applicant's notice of appeal and letter requesting for proceedings were filed two days after judgment had been delivered while the memorandum of appeal and the instant application were filed just over one month from the date of judgment. Counsel referred to the

case of ***Hwan Sung Industries Ltd vs Tadjin Hussein (supra)*** where the court held that an application for stay of execution needs to be brought without delay.

Lastly, counsel for the applicant contended that the respondent is not likely to suffer an injustice from this application because he can be adequately compensated with costs and an award of interest if he succeeds.

On the other hand, counsel for the respondent submitted that the applicant has not satisfied all the three conditions that must exist before a court grants an applicant an order for stay of execution of a judgment, orders and/or decree of the lower court. It was argued for the respondent that the applicant pleaded only one ground under Order 43 rule 4 (3) of the CPR but had not proved that the application has been made without unreasonable delay. Counsel for the respondent pointed out that all the other grounds pleaded upon by the applicant are not required under the rules.

The respondent's counsel argued that a thorough perusal of the entire affidavit in support of the application shows that the applicant has not made out any sufficient cause or at all to support the orders/prayers sought in the application. He submitted that the applicant has not demonstrated that substantial loss may result to him unless the order is made. On the basis of paragraph 6 of the affidavit in reply, it was argued for the respondent that the applicant shall not in any way suffer any prejudice or loss if the execution process is left to continue as the applicant can easily recover all monies paid to the respondent in the event of a successful appeal. In fact in paragraph 7 the respondent deposes that he is prepared to promptly and unconditionally refund such monies as may be recovered in the process of execution, should the appeal succeed.

As to whether the application has been made without unreasonable delay, it was argued for the respondent that the applicant has made an unsatisfactory, unsubstantiated vague and blanket statement.

With respect to the third condition, counsel for the respondent argued that the condition of giving security for due performance of the decree or order as may ultimately be binding on him does not feature anywhere in the applicant's pleadings but was only alluded to in the applicant's submissions after citing the case of ***Hwan Sung Industries Ltd vs Tadjin Hussein (supra).*** He argued that according *to* ***International Credit Bank Limited(In Liquidation) vs Tropical Commodities Supplies Limited & 2 Others Court of Appeal Civil Appeal No. 24 of 2004*** the applicant for an application for stay of execution must satisfy court on all the requirements of Order 43 rule 4 (3) of the CPR.

Lastly, the respondent's counsel agreed with the principles laid down in the authorities cited by the applicant's counsel but contended that the facts are distinguishable and instead cited the case of ***Steel RollingMills Limited & Anor vs Gestation Economique Des Mission Catholique & Anor High Court Misc. Application No. 529 of 2009*** wherein Lameck N. Mukasa, J. discussed at great length the issue of stay of execution pending appeal.

I have considered the grounds of this application, the supporting affidavit and its attachments. I have also considered the arguments for and against this application by the respective counsel for the parties.. The brief background to this application as gathered from the pleadings in Civil Suit No. 1062 of 2010 is that the respondent sued the applicant in the Chief Magistrates' Court at Mengo for recovery of USD 7,450 together with a sum of Ug. Shs. 600,000/=. It was contended that the defendant received the sum of USD 7,450 to procure a

Mercedes Benz motor vehicle E240, 2004 and Shs 600,000/= as part of commission for procuring the said vehicle. The applicant neither procured the vehicle nor refunded the money to the respondent.

On his part the applicant acknowledges receipt of USD 7,450 but contends that it was for onward transmission to Car Zone Japan on behalf of Paul Eganda for the purchase of a Mercedes Benz. It is his case that he transferred the money by TT to the said company and thereafter he was shocked to realize that its website was closed and the phones of its officials switched off. To him they have been conned by the company and so he cannot refund the purchase price of the motor vehicle as well as the commission of Ug. Shs. 600,000/= since the failure to deliver the motor vehicle could not be blamed on him. He denies breaching the contract contending that if there was a breach it was by Car Zone and not him. The respondent obtained judgment in his favour and the applicant having been aggrieved by the judgment and the orders appealed against it. The applicant brought this application to stay execution of the decree until the appeal is determined.

It is now a well established practice that where an unsuccessful party is exercising his or her right of appeal it is the duty of the appellate court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal if successful from being rendered nugatory. See: **Wilson v Church (1879) Vol. 12 Ch D 454** which was cited with approval by Madrama, J in ***Souna Cosmetics Ltd v The Commissioner Customs URA & Another Misc. Application No. 424 Of 2011 (Arising From Civil Suit No. 267 Of 2011)***, ***G. Afaro vs Uganda Breweries Ltd SCCA No. 11/2008*** as per GM Okello JSC and ***Idah Iterura vs Joy Muguta [2007] HCB Vol. 1 42.***

However, the party seeking for stay of execution must meet the conditions set out in Order 43 r 4 (3) of the CPR namely; (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 due performance of the decree has been given by the applicant. I will therefore consider whether this application meets those requirements. I have perused the notice of motion and the supporting affidavit. Indeed like counsel for the respondent pointed out, I find that the applicant did not even state in his affidavit in support that substantial loss may result to him unless the order of stay is made. It is only the applicant's counsel who submitted from the bar that substantial loss will result to the applicant if the application is not granted. In discussing this ground, the applicant's counsel relied on the case of ***Hwan Sung Industries Ltd vs Tadjin Hussein (supra)*** for the position that for a stay of execution to be granted there should be a serious threat of execution before the hearing of the main application. He appears to be inferring the substantial loss the applicant will suffer from the fact that execution is eminent.

First of all the passage from the ruling in ***Hwan Sung Industries Ltd vs Tadjin Hussein (supra)*** which counsel seeks to rely on is not at all relevant to this case in that what was being considered in that case are conditions for granting an interim order of stay of execution. That is why the court observed that it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. That authority is therefore not applicable to the instant case.

Secondly, there are wealth of authorities which state that substantial loss cannot mean ordinary loss of the decretal sum or costs which must be settled by the losing party but something more than that. In the case of ***Steel Rolling Mills***

***Limited & Anor vs Gestation Economique Des Mission Catholique & Anor (supra)*** Mukasa. L, J cited the case of **Pan *African Insurance Company (U) Ltd vs International Air Transport Association High Court Misc. Application No. 86 of 2006*** where the applicant merely stated that if the decree is not stayed the applicant will suffer substantial loss and stated:

> *"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 general assertion of substantial loss in the event a stay order is not granted."*

The Learned Judge also cited the case of ***Banshidar vs Pribku Dayal Air 41 1954*** where it was stated:

> *"It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure"*

In the same case 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…substantial loss must mean something in addition to all different from that."*

I am fully persuaded by that observation and I do find that in the present case the applicant has neither stated nor demonstrated any loss that he will suffer

beyond the decretal sum and costs which the applicant as judgment debtor is ordinarily subject to pay. In the circumstances, the applicant has not satisfied the first condition for grant of application of this nature.

As regards the second condition, I notice that judgment was delivered on 30th April 2013 and two days later the applicant filed a notice of appeal and letter requesting for proceedings. Then on 12th June 2013 the applicant filed a memorandum of appeal. This application was then filed on 10th June 2013. I do not agree with the respondent that the applicant has not demonstrated this ground. On the contrary I find that the applicant has showed that he made his application without unreasonable delay. The second condition is in the applicant's favour.

The third condition that the applicant must meet is the payment of security for due performance of the decree. The applicant did not allude to this condition in his affidavit in support of the application. It was his counsel who merely submitted that the applicant is willing to deposit security of Ug. Shs. 5,000,000/= for due performance of the decree as his appeal is heard. It was the submission of the respondent's counsel that the suggestion of the applicant's willingness to deposit Ug. Shs. 5,000,000/= is not only ridiculous but contrary to law since the decretal sum due and owing in special damages is USD 7,450 and Ug. Shs 600,000/= with interest and costs of the suit and the total aggregate sum that is due and owing is now well over Ug. Shs. 40,000,000 by calculation.

I agree with the submission of the respondent's counsel that the applicant has also not met this condition because Order 43 rule 4 (3) (c) clearly provides that no order for stay of execution shall be made unless the court making it is satisfied that security has been given by the applicant for due performance of

the decree or order as may ultimately be binding upon him or her. Case law authorities confirm that the entire decretal amount has to be deposited in court as a condition precedent to grant of a stay of execution. See among others ***International Credit Bank Limited(In Liquidation) vs Tropical Commodities Supplies Limited & 2 others (supra)*** where it was held that it was mandatory for the respondents who were appellants in the High Court to give security for the due performance of the decree or order as may ultimately be binding upon them/ him or her.

In the instant case the applicant has not offered any security. It is his counsel who submitted from the bar that his client would deposit Shs. 5,000,000/= as security for due performance. I do not know the basis for suggesting that amount but it falls far short of the legal requirement. The applicant has therefore not met this condition as well.

On the whole, the applicant has not satisfied this court on two of the three conditions for grant of an application for stay of execution. I have also taken into account the argument for the applicant that the appeal has high chances of success but I am aware that pendency of an appeal or its high chance of success cannot be used to bar a successful party from exercising his or her right to enforce a decree in his favour. See: ***National Pharmacy Ltd vs Kampala City Council (1979) HCB 132*** and ***Uganda Revenue Authority vs Tembo Steels Ltd HCT Miscellaneous Application No. 521 of 2007.***

For the above reasons, this application fails and it is dismissed with costs. The interim order of stay of execution earlier granted is accordingly vacated.

I so order.

Dated this 7th day of February 2014.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00 pm in the presence of Ms. Apolot Joy holding brief for Mr. Omongole Richard for the applicant, Mr. Fred Gadala for the respondent and Mr. Andrew Kisawuzi, the applicant.

**JUDGE**

07/02/14