

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLANEOUS APPLICATION NO. 630 OF 2017

**(ARISING FROM MISC. APPLICATION 395 OF 2017)
(ARISING FROM HCRT (COMMERCIAL DIVISION) CIVIL SUIT
NO. 271 OF 2015)**

EAST AFRICAN DEVELOPMENT BANK APPLICANT

VERSUS

EDEN INTERNATIONAL SCHOOL LTD..... RESPONDENT

STANDARD CHARTERED BANK LTD GARNISHEE

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under S.98 CPA and 0.52 rr 1 and 3 C.P.R. It is seeking orders of this court:-

- 1) To stay execution of the judgment and decree in Civil Suit No.271 of 2015, Eden International School Ltd vs. East African Development Bank Ltd, pending the determination of an appeal by the Applicant, by stopping the Garnishee Order Nisi from being made absolute.
- 2) The order nisi issued by this court on 20th March, 2017, be set aside on the grounds that it is illegal as the Applicants assets are immune from attachment.
- 3) Costs of the application were also applied for.

The grounds of the application briefly are that:-

- 1) There is a pending appeal before the Court of Appeal. The Applicant has filed a Notice of Appeal and has written a letter requesting for a typed copy of the proceedings to enable a formulation of the grounds of appeal.
- 2) The execution of the decree would be unlawful as it would be contrary to Article 45 of the Applicants Charter which has been domesticated in Uganda by the East African Development Bank (Amendment Act) 2015.
- 3) The appeal pending before the Court of Appeal will be rendered nugatory if this application is not granted.

4) That there is an imminent threat of execution as the Respondent extracted a garnishee order nisi in respect of the money held on account of the Applicant and fixed an application for the order to be made absolute.

5) The application for stay of execution has been made without unreasonable delay.

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6) It is in the interest of justice for this application to be allowed.

The application is supported by the affidavit of Ronald Mulindwa, the In-House Legal Counsel of the Applicant.

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There is an affidavit in reply deponed by Kenneth Kakuru, the Managing Director of the Respondent School/Judgment Creditor.

The affidavit opposes the application for being improperly before court both procedurally and substantially and contends that it is an abuse of court process.

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It gives the background to the suit which culminated into this application, indicating interalia that the Applicant refused to defend the civil suit although given a chance to do so. And that all efforts by the Respondent to have the matter settled came to naught, since the Applicant contends that they are immune to all judicial proceedings. The suit accordingly proceed exparte and judgment was entered against the Applicant on 07.02.17 with all orders appearing therein – See Exhibits “J”, “K” and “L”.

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All demands by the Respondent to the Applicant to obey the said orders were ignored until execution proceedings commenced where upon the Applicant filed this application.

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There is an affidavit in rejoinder sworn by Ronald Mulindwa, Legal Officer of the Applicant. The affidavit gives a background to the dealings between the Applicant Bank and the Respondent that resulted into the suit.

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The Applicant contends among other things that the Respondent has no capacity to repay the sums claimed from the Applicant if the appeal succeeds. And that the Respondent cannot turn around to disclaim the Applicant’s immunity which he acknowledged in their dealings.

On the other hand, that the Applicant has the capacity to pay should the appeal fail and is ready and willing to deposit an appropriate Bank guarantee for the decretal sum.

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The affidavit was sworn without prejudice to the immunities and privileges of the Applicant Bank and court was urged not to construe it as a waiver, renunciation or other modification of any immunities, privileges or exemptions of the Applicant Bank accorded under the Charter and Treaty establishing the Bank.

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The application was called for hearing on 05.04.17. Before that date, the Applicant Bank had directed that the title, the subject of the mortgage which had been brought to court be released to the Director of the Respondent School, which was done.

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Before hearing the application, Counsel for the Respondent informed court that while the title had been returned, the mortgage had been retained, contrary to the order of the Commercial Court.

This court therefore directed that the mortgage be released from the title and an order to that effect was extracted.

5 Counsel for the Applicant then went through the motion and the orders sought and the grounds thereof as earlier set out in this ruling.

It was then emphasized that the Applicant was ready to deposit security in form of a Bank guarantee or any other security the court may deem appropriate.

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Commenting about the affidavit in reply, Counsel stated that it was raising issues of contempt in respect of the Applicant's refusal to surrender the title, which were no longer relevant as the title had since been surrendered.

15 As to the assets of the Applicant being immune to attachments, court was referred to the East African Development Bank (Amendment) Act 2015, asserted to by Uganda on 05.08.15.

It was then submitted that the charter of the bank was domesticated and Article 45 thereof provides for immunity of the assets. Article 45(I) makes it absolutely clear, Counsel argued, that
20 ***“the assets of the Bank where so ever located shall be immune fromattachment..... of any other form of measure”***. That property is defined in Article 45(3) to include ***“funds that have been attached under the order nisi”***. The case of **Blueline Enterprises Ltd vs. East African Development Bank Tanzania CA CA 21/12** was relied upon to support the issue of immunity and the Bank and its assets form attachment.

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That the court stated that ***“there is a distinction between immunity from jurisdiction and immunity from execution. It does not follow that because one has obtained a judgment, one cannot plead immunity from attachment”***. The jurisdictions are different – court was referred to page 25 of the judgment.

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Secondly that ***“due process is not infringed by the enjoyment of immunities even where a claimant is frustrated in prosecuting a lawful claim”***. Page 26.

The court also commented about the principles of natural justice at page 27 when it stated that
35 ***“principles of natural justice do not supplant the law but supplement the law. Their application may be excluded by statute either expressly or by necessary implication”***.

The case of **Flatow vs. Islamic Republic of Iran 74F Supp. 2D18, 1999**, was cited in support. In that case, a judgment had been obtained against the Republic of Iran. But because of the
40 immunity enjoyed by the Republic of Iran, execution could not take place under the Foreign Sovereigns Immunities Act.

That the case makes the distinction between jurisdictional immunity and executorial immunity. It also talks about what seems to be unfair within the law.

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The East African Development Bank (Amendment) Bill, 2013, memorandum signed by the then Minister of Finance basically provides the objective behind the Bill, Counsel contended. And that is, to protect the Bank in execution of judgment against its assets.

Referring to Article 273 (I) of the Constitution, it was submitted that the courts in two cases looked at the Government Proceedings Act and the Civil Procedure & Limitations Miscellaneous Provisions Act respectively, to ensure that the statutes conform to the Constitution. Both statutes predated the Constitution. – Refer to **Straco Ltd vs. Attorney General CA 32/2002** and
5 **Kabandize & 2 Others vs. KCCA CA 28/11**.

However, that the law in the present case post dates the Constitution and therefore the two cases referred to above are not relevant within the meaning of Article 271 of the Constitution.

10 It was pointed out that the Applicant is in a position to deposit security as indicated in the affidavit in rejoinder. And also contended that the Respondent on the other hand does not have the capacity to refund the money, in case the appeal succeeds. It was emphasized that it took the Respondent ten years to repay the loan instead of the agreed six years, and that the parties had to re-enter into a rescheduling agreement.

15 And further that, this was a development loan where the repayment of the funds was expected to come from the project itself, yet the personal property of the Director had to be sold to repay the loan. It was argued that, that is an indicator that the Respondent on its own was incapable of generating cash flows from the project to repay the loan.

20 Urging court to look at clause 8.05 of the loan agreement where the Respondent is alleged to have recognized the immunity of the Applicant, Counsel prayed that the application be allowed more so as the Bank is ready and willing to deposit any form of security imposed by court.

25 The application was vehemently opposed by Counsel for the Respondent. He referred court to paragraphs 4-13 of the affidavit in reply which lays out the back ground to the case, asserting that the Applicant deliberately refused to defend itself in court even when its Counsel was in court. The case of **Agastafa Kiganira vs. Kagenda Haruna CA 46/11** was cited for the holding that, ***“where a defendant simply stays away from court proceedings despite being present when the matter was fixed for hearing, an attempt by such a party to be heard on appeal is an abuse of court process”***.
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That therefore the present application is an abuse of court process Counsel argued.

35 It was also submitted that stay of execution is discretionary and court has to exercise its discretion based on well established principles.

The principles for grant of stay of execution were laid down by the Supreme Court in the case of **Sekikubo & 3 Others vs. Attorney General & 2 Others Const. Appl 06/13**.
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These include:-

- 1) Likelihood of success of appeal or prima facie right of appeal.
- 45 2) The Applicant will suffer irreparable damage and the appeal will be rendered nugatory if stay is not granted.
- 3) Balance of convenience.

It was then argued that, the Applicant had not established likelihood of success of the appeal, as there is no draft memorandum of appeal to show any possible grounds of appeal for court to ascertain.

5 That the alleged immunity of the Applicant was resolved in the judgment relying on a Supreme Court Appeal setting aside the immunity, which overrides that of the Court of Appeal of Tanzania.

10 Also that the Applicant had not shown how it will suffer irreparable damage if execution proceeds. The case of **Francis Kanyanya vs. Diamond Trust Bank HCCS 300/08** cited in **Legal Brains Trust vs. Attorney General M/A 638/14** was cited for the holding that ***“irreparable damage is that which cannot be adequately compensated for by damages”***.

15 Counsel asserted that since the application arises from attachment of money due to the Respondent, no damage will be suffered by the Applicant if the money is paid, just as no damage was suffered upon return of the title.

20 And that while the Respondent took long to repay the loan, the record indicates that there was over payment by over Shs. 200,000,000/- from which Respondent has benefited and indication of the Respondents capacity to repay.

25 Further that, the appeal will not be rendered nugatory as it centers on points of law and not fact. The facts were about the amount of money over paid which the Applicant declined to defend at trial. Therefore the Respondent should not be deprived of its money.

Counsel also contended that, the affidavit in rejoinder is essentially a belated written statement of defence or an appeal. And that it’s frivolous and vexatious and should be disregarded by court.

30 If the order nisi is not applicable because of the alleged immunity of the Applicant Bank, does it mean that what is happening in court is just drama? Counsel wondered. If the Bank is immune, how can court issue the orders sought?

35 Referring to the supposed amendment to the East African Development Bank (Amendment) Act 2015, it was stated that, court had not been told that the matter was filed before the amendment. And that Respondent did not anticipate the amendment and that it would not have any legal remedies. The law that existed governing the Respondent and the Applicant – Article 44 and 45.

40 Further that, if a party is permitted to sue, then it is permitted the legal remedies upon it succeeding.

It was further pointed out that the decretal amount attracts interest of about Shs. 175,000/- per day.

45 He prayed for the dismissal of the application on the ground that it is an abuse of court process and that costs should be granted to the Respondent.

Counsel for the Attorney General, who appeared as a friend of court the submitted that the East African Development Bank is an International Financial Institution created by a Treaty concluded by the member states of the East African Community, including Uganda.

That the Government of Uganda is a signatory to the Treaty and the Bank's Charter – Annex 6 to the Treaty.

- 5 To enable the Bank effectively carry out its objectives and functions to which it is entrusted, the Charter grants the bank certain immunities, exemptions and privileges to be accorded to it in the territories of the member states.

10 Article 44 of the Charter grants the Bank immunity from every form of legal process except where it has expressly waived its immunity in writing.

Article 45 – grants immunity of the assets of the Bank from attachment.

15 Further that, pursuant to the Treaty, the Parliament of Uganda passed the East African Development Bank Act, which was amended in 2015- to provide for carrying out the obligations of Uganda under the Treaty.

20 S.3 of the Act, provisions of the Charter as annexed to the Treaty and set out in the schedule shall have force of law in Uganda.

The Act gives effect to the provisions of the Charter which grant the Bank immunity from legal process and attachment of assets.

25 Uganda being a member state of the Treaty establishing the Bank and a signatory to the Treaty, has a legal obligation to protect the immunities, privileges and exemptions accorded to the Bank under the treaty.

30 That the Government of Uganda has shown its total commitment to its international obligations under the Treaty and is also bound by Article 130 of the Treaty establishing the East African Community; which provides that partner states shall **show** their commitment in respect of other International Organizations of which they are members.

35 In line with this, the five member states had their 13th Extra-Ordinary Summit in Bujumbura on 30.11.11 and directed that

40 In light of the above provisions, Counsel contended, it is clear that the properties, assets and business premises of the East African Development Bank enjoy absolute immunity under Article 45, except when exercising its borrowing powers.

And that a contrary view would lead to the breach of the terms of the Charter and Treaty established by the East African Community and would not augur well with the country's relationship with other Partner States and the international community.

45 In rejoinder, Counsel for the Applicant submitted that the case of **Kiganira (Supra)** - is a matter to be handled on appeal. And that S.67 (I) CPA gives an automatic right of appeal against decrees passed exparte.

Commenting about the likelihood of success, Counsel stated that, the case referred to by Counsel for the Respondent was a Supreme Court case and therefore the court would have been in a position to determine that issue.

- 5 That this not being an Appellate Court, it cannot place itself in the shoes of the appellate court to determine the likelihood of success.

At this level, court does not have to see the memorandum of appeal. What is required is a notice of appeal and an application for certified proceedings, which have been demonstrated.

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The Tanzanian authority is preferable to the Supreme Court authority because it was dealing with similar provisions of the same Charter. While the other case was dealing with a different Charter.

- 15 Irreparable damage – the **Legal Brains Trust Case** dealt with temporary injunction and not a stay of execution.

Also that the Applicant had demonstrated that the Respondent has no capacity to repay the funds and that would amount to irreparable damage. Yet the Bank is providing a guarantee to secure the funds. The guarantee can take care of the interest accruing.

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Further that, immunity is a point of law. If the court were to make a finding that the Applicant is immune from court process notwithstanding, that appeal would be strictly on points of law and the judgment of the High Court would be set aside and the money would stand not to be paid.

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At the time of this application, the Amendment Act which restricts attachment and execution is already in force.

- 30 The law would have been relevant in respect of jurisdiction at the time of hearing. The law applicable at execution is the East African Development Bank Amendment Act.

Earlier prayers were reiterated, adding that the matter before the Registrar be stayed until after ruling is delivered.

- 35 The matter before the Registrar that is making the decree nisi absolute was stayed but court decided that the decree nisi remains in force in order to preserve the funds.

Court: whether this is a proper case for grant of stay of execution.

- 40 I have heard the submissions of all Counsel and given them the best consideration I can in the circumstances.

From the outset, I wish to state that, the Applicant having refused to participate in the hearing in the Commercial Court where all the issues being raised now would have been effectively dealt with, would not ordinarily be allowed to be heard at this stage. By declining to appear to defend itself in the Commercial Court, the Applicant put itself out of court.

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However, the balance of convenience demands that the application be allowed since the Applicant has offered to deposit a bank guarantee in the sums being claimed by the Respondent, pending the disposal of the appeal or mediation proceedings between the parties.

5 I am inclined to advise the parties to try mediation because the Applicant claims that the relationship between Uganda and Other East African Community Member States will be strained by continued litigation, and it is also not indicated when the appeal is likely to be disposed of.

10 In the circumstances, the parties could go back to the Commercial Court to mediate on the issue as to how the sums decreed to the Respondent can be paid without resort to attachment of its assets or engage in mediation on appeal.

15 I wish to observe that it would be the greatest travesty of justice if a party who has a right granted by the Constitution and who is trying to enforce that right is denied that right on the ground that the properties of the Judgment Debtor are immune from attachment. Immunity of attachment to its assets should not close other doors of enforcement of the decree against the Applicant, more so in a situation like the present where the Applicant willingly entered into a commercial transaction.

20 The Application is allowed and the decree nisi is stayed on the following conditions:-

- 1) The Applicant deposits a bank guarantee in the sum due and owing to the Respondent including accumulated interest within two weeks from the date of this ruling.
- 25 2) The parties are advised to engage in mediation either on appeal or at the Commercial Court – to determine how the sums due to the Respondent can be paid without attachment of the assets of the Applicant- S.33 Judicature Act.
- 3) Costs of this application are granted to the Respondent.

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Flavia Senoga Anglin
JUDGE

35 **02.10.17**