THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS APPLICATION NO. 722OF 2020

(Arising from CS No. 139 OF 2016)

BARCLAYS BANK LIMITED:::::::::::::::::::::::::::::: APPLICANT

VERSUS

ELECTRO WATTS UGANDA LIMITED:::::::::::::: RESPONDENTS

BEFORE: HON. MR JUSTICE RICHARD WEJULI WABWIRE

R U L I N G

The Applicants seek an order to stay execution of parts of this Court's Judgment in HCCS 139 of 2016, pending hearing and determination of an intended Appeal from the said judgment.

They specifically intend to appeal against the general damages awarded, the interest awarded on the general damages at 6% per annum from date of judgment until payment in full and the costs of the suit.

The grounds of the Application are contained in the Affidavit in Support deponed by Gerald Emuron, the Applicants Legal Officer, but briefly are;

1) That Applicant is dissatisfied with a part of the decision of this Court in HCCS 139/2016, wherein the Applicant together with the 2nd Defendant, Wasswa Abdul, were ordered inter alia to jointly and severally pay the Respondent/Defendant, general damages to the tune of Ugx113, 016,750/=, interest on the damages at the rate of 6% per annum until payment in full and costs of the suit.
2) The Applicant intends to appeal to the Court of Appeal, the intended Appeal has a high likelihood of success.
3) That the Applicant will suffer substantial loss if the Application, which has been filed without unreasonable delay, is not allowed.
4) That if the impending execution is not stayed, the Respondent may proceed to execute against the Applicant.
5) That the Applicant is ready and willing to deposit security for due performance of the decree in form of a Bank guarantee and that it is in the interest of justice that the Application be granted.

The Respondents contested the Application by Affidavit in Reply and the submissions by Counsel.

The Applicants were represented by Mr. Martin Kakuru of Ligomarc Advocates while the Respondents were represented by Mr.Peter

Mulongo of Arcadia Advocates. They addressed Court by oral submissions.

Counsel for the Applicant submitted that the Applicants had complied with the provisions of order 43 rule 4 CPR by filing a Notice of Appeal and have applied for typed and certified record of the proceedings and judgment in HCCS 139 of 2016. That the intended appeal raises triable issues with a high likelihood of success and that the Applicants will suffer substantial loss if the Application is not allowed.

The particulars of the loss that they may allegedly suffer are itemized in paragraph 3 of the Affidavit in Rejoinder and I will not reproduce them here. That Applicant is ready and willing to furnish security for due performance of the decree in the form of a bank guarantee.

In Reply, counsel for the Respondents contended that the Application had been filed as matter of course, as it does not meet the conditions for grant of stay of execution. They further submitted that when considering the Application, Court should have in mind the competing interest of the Respondents who should not be denied the right to realize the fruits of the judgment which was passed in their favor and that the Affidavit in Support does not show any specific circumstances that warrant grant of the Application.

On the likelihood of success, counsel for the Respondent contended that while the Applicant had a copy of the judgment, they had to date not formulated their grounds of appeal, which leaves the Court to

speculate on whether the intended appeal has a likelihood of success or not.

Regarding threat of execution, Counsel further contended that the Applicant does not indicate that the Respondent is in the process of extracting a decree of Court, no demand issued nor notice to show cause and no Application for execution. Counsel submitted that the Notice of Appeal had never been endorsed by Court and that the Applicant had not indicated to Court that he had made any efforts to obtain the record of proceedings. That all the foregoing are indications that the Applicant is not serious about prosecuting the appeal or takes it seriously. That the appeal is a matter of course.

He contended that the subject matter of the suit is ascertainable and that the Applicant has not shown that if the decree is executed and the appeal succeeds, the Applicants would not be able to recover the money. He cited the case of **URA V Kirenga Fred MA 91 of** 2014 to make the proposition that this Court should discourage litigants from filing routine Applications and consuming valuable time of Court and that this Application therefore be denied.

In rejoinder, the Applicants submitted that the Respondents' fears that they may not realize the fruits of their judgment are allayed by the fact that the Applicants are willing and offer to furnish security for due performance of the decree. That the intended appeal has high chances of success but that what the Respondents were asking Court to do in determining the likelihood of success would amount to an evaluation of the merits of the appeal, which Court is at this stage

not obliged to do. That unlike an interim Application for stay of execution, which this one is not, an Application of this nature does not warrant proof that execution is imminent.

On the contention by the Respondents that the Notice of Appeal was not signed, Counsel for the Applicant submitted that there was a Notice of Appeal on record and that the unsigned copy is what was sent to the Court of Appeal that the Applicant has applied for the Record of Proceedings and that there are various reminders, on the file, of the requests sent to Court. They distinguished the case of **URA V Kirenga** (supra) from the instant case in that the instant case was not a routine interlocutory Application but is one that is final and intended to secure the rights of the Applicant.

In **Asante Aviation Limited V Stanbic Bank (U) Ltd MA 555 of 2020**, this Court cited the factors that may warrant grant of a stay of execution as were stated in **Theodore Ssekikubo and OR's v The Attorney General and Others, Constitutional Application No. 03/2014** and in the case of **John Baptist Kawanga vs. Namyalo Kevina and another, MA No. 12/2017**, as follows;

i. that the Applicant must show that he lodged a Notice of Appeal;

ii. that substantial loss may result to the Applicant unless the stay of execution is granted;

iii. that the Application has been made without unreasonable delay;

iv. that the Applicant has given security for due performance of the Decree or order as may ultimately be binding upon him;

v. that there is serious or imminent threat of execution of the Decree or order and if the Application is not granted, the appeal would be rendered nugatory;

vi. That the Application is not frivolous and has a likelihood of success and that refusal to grant the stay would inflict more hardship than it would avoid.

These cases provide a basis that I have applied to ascertain whether the prerequisites for stay of execution were fulfilled in the instant Application.

R.76 of the Judicature (Court of Appeal Rules) Directions SI 13-10 provides that;

"(1) Any person who desires to appeal to the Court shall give Notice in writing, which shall be lodged in duplicate with the Registrar of the High Court.

(2) Every notice under sub rule (1) of this rule shall, subject to rules 83 and 95 of these rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal."

Annexure B to the Applicants' Affidavit in Support shows that a Notice of Appeal was lodged in this Court on 20th March 2020 and was served on Counsel for the Respondents on the same date.

The Judgment sought to be appealed was delivered on 6th March 2020. The Notice of Appeal was lodged with the Registrar of the High Court 14 days after delivery of the Judgment, which is well within

the stipulated 14 days, in line with **Rule 76 (1) & (2) of the Judicature Act**.

The Applicants therefore lodged a Notice of Appeal, and did so without unreasonable delay, as evidenced in **Annexure B** to the Applicants' Affidavit in Support, thereby fulfilling two of the prerequisite necessary for grant of stay of execution pending appeal.

The Applicant have also stated in the Application and in there Affidavit in Support that they are willing and offer to furnish security for due performance of the decree. Noteworthy, the Applicants are a Banking institution. I have no reason to doubt that they have the capacity to avail such security as they have suggested in their Affidavit in support and submissions by learned Counsel for the Applicants. They therefore satisfy this ground.

The other prerequisite that is a precondition for grant of an Application such as the instant one, is to demonstrate that substantial loss may result to the Applicant.

In Paragraph 7 of the Affidavit in Support of the Application, the deponent averred that the Applicant will suffer substantial loss if the Application is not granted and that the appeal would be rendered nugatory. That the anticipated loss will arise, as is stated in paragraph 3 of the Affidavit in Rejoinder, in that;

The Applicant receives depositors money and applies it towards lending to borrowers at interest, they in turn pay interest to depositors and that therefore for the Applicants to pay out any money

against a decree which they are challenging on appeal, would reduce its liquidity and deny the Applicant and its customers an opportunity to earn interest on it. Further, that in the event that the money in the decree is paid out to the Respondent and the Applicants' appeal is successful, the Applicant's money would have lost value due to the time it would have spent with the Respondent without earning interest and that the chance of recovering from the Respondent was not certain.

That based on the foregoing, the Applicants were therefore bound to suffer substantial loss if the Application is not allowed.

I am inclined to agree with the Respondents' Counsel that it was not in any way demonstrated that the Applicants would suffer any irreparable loss. The subject matter of the suit is ascertainable and the Applicant has not shown that if the decree is executed and later the appeal succeeds, the Applicants would not be able to recover the money. What the Applicants ought to have demonstrated is the Respondents inability to pay back the money in the event that the appeal succeeded, as opposed to lost revenue opportunities that the Applicants may miss out on before the appeal is resolved. It is the capacity of the Respondent to make good a refund following a decision against them on appeal that should be under scrutiny and not the otherwise missed opportunity to make gains out of the money, pending disposal of the appeal. This prerequisite is not satisfied.

The other prerequisite to consider is that there is serious or imminent threat of execution of the Decree or order and if the Application is not granted the appeal would be rendered nugatory. The Respondents submitted that the Application does not indicate that the Respondent is in the process of executing the decree and that there is even no Application for execution, however the Applicants contended that it was not necessary for them to prove imminence of execution this being a substantive and not interim Application.

This position, as stated by the Applicants, holds true in law and was so stated in the case of **Kitende Apollonaries Kalibogha and 2 others vs. Mrs. Eleonora Wismer; (Supreme Court Miscellaneous Application No. 6 of 2010)** where Justice Okello, JSC, held that ;

"I agree with the principle stated by this Court in Hwang Sung Industries Ltd (Hwang Sung Industries Ltd vs. Tajdin Hussien and 2 others Supreme Court Miscellaneous Application No. 19 of 2008) regarding grant of an interim order of stay of execution. The Applicant must show by evidence that there is a pending substantive Application for stay of execution and that there is a serious threat of execution of the decree before the hearing of the substantive Application for an interim order to issue".

This being a substantive Application, the Applicant did not have to adduce evidence of imminent execution. Be that as it may, the inevitability of execution of the decree is only a matter of time, as the Respondents will for certain be moving to realize the fruits of their judgment, even if Counsel for the Respondents submitted that there is no imminent threat of execution, this was evidence from the bar. There is therefore every possibility that execution is imminent.

In considering the likelihood of success of the appeal as a ground to grant or refuse the Application for stay of execution, Court treads a thin line to ensure that it does not delve into the merits of the intended appeal. This however does not mean that Courts should look away and allow underserving and frivolous Applications to be granted. For this reason therefore, Court must be guided and be better informed in arriving at a decision by being accorded some insight into the nature of the intended appeal. This usually is enabled by having a draft grounds or Memo of Appeal availed along with the Application for stay of execution.

Whereas the Applicants submitted that the intended Appeal has a high likelihood of success, they had to date, as rightly pointed out by Counsel for the Respondents, not formulated their grounds of appeal despite the fact that they had a copy of the judgment all along. This leaves Court to only speculate on whether the intended appeal has a likelihood of success or not.

Indeed, Court cannot therefore make an informed opinion about the submissions by the Applicants and the contentions by the Respondents on the likelihood of success of the intended Appeal. The intended appeal is only against the general damages awarded, interest thereto and costs. All of which are premised on exercise of the discretion of the trial Court than on the evidence adduced. I am unable to discern from the Application and Affidavits in support whether an appeal against the award of damages would stand any chance of success.

I am not satisfied that the Applicant has established that the intended appeal has high likelihood of success. This condition has not been satisfied.

Broadly, it is my conviction that this Application was brought as a matter of course and will only serve to delay the Respondent from enjoying the fruits of their judgment. I find very limited merit in the Application.

Mindful of the fundamental position cited below, that;

"the objective of the legal provisions on security was never intended to fetter the right of appeal. It was intended to ensure that Courts do not assist litigants to delay execution of Decrees through filing vexatious and frivolous appeals." (see ***Kawanga vs. Namyalo and another, MA No. 12/2017),***

I am convinced that this is a proper case in which the Applicant should meet the requirement for deposit of a security for due performance of the decree, to curb possible wastage of Court's time and to also ensure that the Respondents entitlement to the fruits of the decree is not jeopardized, should the Appeal fail.

The Applicants have offered to make a deposit of security for due performance of the decree.

In the event, I grant the orders sought on condition that;

1. the Applicants furnish to this Court security for due performance of the decree in the form of a bank guarantee in favor of the Respondents, issued by a third party Bank (not the Applicant/Defendant bank), for Ugx 113,016,750/=

undertaking to pay that sum to the Respondents upon 1st demand following determination of the intended appeal against the Applicants/Appellants.

2. The Applicant shall make a cash deposit with this Court, of Ugx 20,000,000/= being security for costs in Civil Suit No.139 of 2016.
3. The aforementioned securities shall be effected within 30 days from the date hereof, failure upon which this Application will stand dismissed and execution of the decree in CS 139 of 2016 shall proceed unfettered.
4. I make no order as to the costs of this Application.

Delivered at Kampala by email to Counsel for the respective parties and signed copies for the parties placed on file this 6th day of November, 2020.

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RICHARD WEJULI WABWIRE

JUDGE