**THE REPUBLIC OF UGANDA**

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

**[COMMERCIAL DIVISION]**

**M.A No. 467 of 2021**

**(Consolidated with M.A No. 481 of 2021)**

**(Arising from M.A No. 392 of 2021)**

**(Arising from Civil Suit No. 721 of 2020)**

**CHINA HENAN INTERNATIONAL**

**COOPERATION GROUP COMPANY LIMITED::::::::::::::APPLICANT**

**VERSUS**

**JUSTUS KYABAHWA:::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE DUNCAN GASWAGA**

**RULING**

[1] This is a ruling on an application *(M.A No. 467 of 2021 consolidated with M.A No. 481 of 2021)* brought under Section 33 of the Judicature Act, Cap 13, Section 98 of the CPA, Cap 71, Order 43 rule 4 and Order 52 rule 1 of the Civil Procedure Rules, SI 71-1 for orders that; *execution of the decree in Civil Suit No. 721 of 2020 be stayed pending the determination of the applicant's appeal; the garnishee order nisi issued under M.A No. 392 of 2021 be set aside and that costs of the application be provided for.*

[2] From the outset, it should be noted that the applicant had on the 01/04/2021 filed an application for stay of execution orders vide M.A

No. 467 of 2021 and M.A No. 468 of 2021 for an interim stay of execution order. On the 08/04/2021 the applicant also filed M.A No. 481 of 2021 for an order of stay of garnishee proceedings and M.A No. 490 of 2021 for an interim order of stay of garnishee proceedings. Today, at the commencement of the hearing, the applicant's Counsel moved court to have M.A No. 467 of 2021 and M.A No. 481 of 2021 consolidated and heard together. Accordingly, leave was granted and the said two main applications were consolidated while the other two (M.A No. 468 of 2021 and M.A No. 490 of 2021) for interim orders were abandoned since they had been overtaken by events.

[3] The grounds of the application were detailed in the affidavits of **Zhang Jinpai** in support of the applications and they were that; the respondent/plaintiff instituted Civil Suit No. 721 of 2020 against the applicant/defendant in which Judgment was delivered on 19/03/2021 in favour of the respondent/plaintiff. On the 30/03/2021 the applicant was served with a garnishee order nisi vide M.A No. 392 of 2021 wherein the applicant's bank accounts in Stanbic Bank were garnished. The matter was fixed for 09/04/2021 before a Registrar for the applicant to show cause why the garnishee order nisi should not be made absolute. It was further deponed that the applicant's appeal raises pertinent and substantial questions of law with a high likelihood of success. That the applicant will suffer irreparable loss if the execution of the said decree is not stayed and the garnishee order nisi set aside pending the determination of the appeal. In a nutshell, the applicant contended that if the application is not granted to stop the execution process, the applicant's appeal will be rendered nugatory.

[4] The respondent opposed the application and stated that the applicant had not demonstrated any likelihood of success of the intended appeal and that the claim of the appeal being rendered nugatory shall not arise as the applicant will not suffer any harm that cannot be adequately compensated for by an award of damages.

[5] Order 43 rule 4(3) CPR enjoins this court to grant an order for stay of execution upon the applicant's fulfillment of all required conditions therein. These grounds were outlined in the case of **Hon. Theodore Ssekikubo & Others Vs. The Attorney General and Another, Constitutional Application No.06 of 2013** as follows;

> *"In order for the court to grant an application for stay of execution;*
>
> *i) The applicant must establish that his appeal has a likelihood of success; or a primafacie case of his right to appeal*
>
> *ii) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted*
>
> *iii) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies*
>
> *iv) that the applicant must also establish that the application was instituted without delay*

[6] **Likelihood of success of the appeal:** It was submitted that the applicant's appeal raises serious questions of law and fact with a high likelihood of success. The applicant relied on the case of **Nalunga Gladys Vs. Edco Limited and Another, M.A No. 07 of 2013.** Apart from merely deponing under paragraph 9 of the affidavit in support of

the application that the intended appeal raises pertinent and substantial questions of law regarding breach of contract, validity of variation deeds and grant of damages and general damages and has a high likelihood of success, the applicant has not demonstrated any likelihood of success. At least the applicant should have indicated the questions of law and or fact intended to be raised on appeal so as to give an idea on the seriousness of the appeal. But clearly from the face of the application and the supporting affidavits and judgment, nothing shows any sign of a likelihood of success with the appeal. I say so bearing in mind that this court cannot delve into the merits of the appeal or the case at this point in time. In **Gashumba Maniraguha Vs. Sam Nkudiye SCCA No. 24 of 2015**, the Court of Appeal stated among others that; *".....further, in our view, even though this court is not at this stage deciding the appeal, it must be satisfied that the appeal raises issues which merit consideration by court."*

[7] It is not in dispute that a Notice of appeal has been filed and the letter requesting for the proceedings lodged in this court. It is also beyond the ground of contention that this application for stay of execution had been swiftly lodged. However, as to the pendency of an appeal and its likelihood of success it was held in **Uganda Revenue Authority Vs. Tembo Steels Limited, M.A No.0521 of 2007** that: *"pendency of an appeal is not a bar to a successful party's right to enforce a decree obtained even by execution".* See also **National Pharmacy Limited Vs. Kampala City Council [1979] HCB 132** and **Dr. Ahmed Muhammed Kisuule Vs. Greenland Bank (In liquidation) SCCA No. 07 of 2010**. Resultantly, I find that the applicant has failed to prove this ground.

[8] **Substantial loss/ harm:** the applicant has submitted that it will suffer substantial loss or harm considering that the sums awarded to the respondent are colossal yet the applicant will not be able to recover the money in case the appeal succeeds. On the other hand the respondents contended that the applicant will not suffer any substantial loss that cannot be compensated for by an award of damages. That it is not every harm that the applicant suffers as a result of refusal of an application of this nature that can be compensated by damages. In the case of **Tanzania Cotton Marketing Board Vs Cogecot Cotton Co. SA (1995-1998) 1 E.A 312** wherein Lubuva, J cited with approval the Indian case of **Bansidhav Vs Pribku Dayal AIR 41 1954** it was stated that;

> *"it is not enough to merely repeat words of the code and state that substantial loss will result; the kind of loss must be specified, details must be given and the conscience of the court must be satisfied that such loss will really ensue. The words substantial loss 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 and since the law expressly prohibits stay of execution as an ordinary rule, it is clear the words 'substantial loss' must mean something in addition to all different from that." See also* ***Pan African Insurance Co. (U) Ltd Vs International Air Transport Association, M.A No.086 of 2006*** *and* ***Dr. Ahmed Mohammed Kisuule*** *(supra)*

[9] The applicant's affidavit in support of the application, paragraphs 9 to 10, vaguely states that the applicant may suffer irreparable loss if the execution is not stayed also because the amounts awarded to the

respondent are colossal yet the respondent has no capacity to refund the monies if the appeal succeeds. Clearly, apart from stating so, the applicant has failed to demonstrate how it would suffer irreparable or substantial loss for harm if the execution is not stayed. The particulars of the loss have not been given to satisfy court. See **American Cyanamid Co. Vs. Ethicon Ltd [1975] 2 W.L.R. 316**. Merely stating the huge sums of money involved in the case is not enough to demonstrate the likely harm or loss. Moreover, these are sums of money that were well known and planned and budgeted for since the day of execution of the contract in 2015 between the parties. It is not news to the applicant and when litigation commenced it should have been anticipated that one of the parties would inevitably lose. Therefore, this cannot be an excuse for the applicants from executing their project obligations painful and inconveniencing as it may be. In the same vein, I am unable to accede to the argument that if the execution (worth approximately four billion Ugx) is done, would paralyze or cripple the operations of a project worth over two hundred billion Ugx. The claim is a trifling amount of the total project sum and being a giant international company, no irreparable damage could conceivably be caused to the applicant. For it is not in dispute that the applicants have already paid the respondent approximately 60% of the contract price (consideration).

[10] The court also disagrees with the submission that the respondent won't be able to refund the money if the appeal succeeds because no evidence has been adduced in support. Instead, the respondent submitted that he was not impecunious in case he lost the appeal he was ready, able and willing to pay whatever monies that would be

awarded. See **DFCU Bank Ltd Vs Dr. Ann Persis Nakate Lusejjere C.A.C.A No. 29 of 2003**. It should be stressed that we are dealing with a judgment creditor and a judgment debtor at this point in time and unless very good and convincing reasons are advanced a judgment creditor should never be inconvenienced and or delayed in the enjoyment of the fruits of their litigation. It should not be forgotten that this is execution of a judgment (decree) and not attachment before judgment. I wish to add that there cannot be irreparable harm in paying money lawfully adjudged by a court of law. Should it turn out that the appeal is successful, the law provides for various means of recovering any monies or damages awarded from the respondent.

[11] In these circumstances therefore, where the applicant has failed to prove by affidavit evidence that it will suffer harm or loss or has an appeal that has a high likelihood of success, then the balance of convenience would be in not granting this application for stay of execution but to allow the party with a judgment in hand to go ahead with the process of execution. See **Fredrick Mukasa and another Vs Jade Petroleum (U) Ltd M.A No. 2374 of 2016**. Also related to this, allowing the request of the applicant to deposit 10% of the decretal sum as security for due performance of the decree as they wait for the determination of the appeal would still be inconveniencing to a party who has duly won their court case, and given the intricacies involved in execution processes may suffer further delays. Application after application have been filed. Litigation must come to an end.

[12] **In conclusion, I find that this application is devoid of any merit and is a further delay of the justice of this case. It is accordingly dismissed with costs.**

**I so order**

**Dated, signed and delivered at Kampala, this 09th day of April 2021**

**Duncan Gaswaga**

**JUDGE**