THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1171 of 2020

(Arising from Civil Suit No. 0066 of 2012)

KESACON SERVICES LIMITED …… APPLICANT

VERSUS

STANBIC BANK LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant sued the respondent for declaration that the latter had breached both the loan agreement and the mortgage deed in a transaction of borrowing between the parties. The applicant also sought to recover shs. 1,502,306,176/= in special damages and costs. Judgment was on 11th August, 2020 entered in favour of the respondent wherein the applicant was ordered to refund shs. 476,381,200/= to the respondent with interest at the rate of 7% per annum from 16th September, 2012 until payment in full as well as the costs of the suit. Being dissatisfied with the decision the applicant filed a notice of appeal on 18th August, 2020 and applied for a certified copy of the record of proceedings.

b. The application.

The application is made under section 33 of *The Judicature Act*, Order 43 rules 4 (2) and (3) alongside Order 52 rule 1 of *The Civil Procedure Rules*. The applicant seeks leave to amend the notice of appeal and an order of stay of execution of the decree. The grounds are that the intended amendment is required to ensure that the notice of appeal is in conformity with the specimen form and provisions of *The Judicature (Court of Appeal Rules) Directions*. On the other hand, the applicant stands to suffer irreparable loss if the decree is executed before the appeal is heard.

c. The affidavit in reply

In its affidavit in reply, the respondent avers that this court has no jurisdiction to order amendment of a notice of appeal in matter that is pending before the Court of Appeal. The notice of appeal on the other hand is fatally defective and therefore cannot be amended. There is no legal basis for staying execution of the decree. In the alternative, the applicant should be required to deposit the decretal sum in court as a condition for the stay.

d. Submissions of the applicant

Represented by its Managing Director, the applicant, submitted that the applicant has satisfied the conditions for grant of an order of stay of execution. It has filed a notice of appeal, has applied for a certified copy of the record of proceedings, and the application has been made without undue delay. The intended appeal has a high likelihood of success yet the applicant stands to suffer irreparable loss in the event that execution of the decree goes ahead before the appeal is heard. The property at stake is the only one available to the applicant which it offers as security in order to access financing without which the applicant is bound to go into receivership or liquidation. The applicant shall deposit security for costs at the time of filing the appeal after it has been provided with a certified copy of the record of proceedings.

e. Submissions of counsel for the respondent.

Counsel for the respondent, M/s MMAKS Advocates submitted that the notice of appeal is defective for having a heading indicating "Court of Appeal" instead of the "High Court." The decretal sum currently stands at over shs. 776 million. The applicant should be required to deposit that sum in court as a condition for the stay of execution. The intended appeal is unlikely to succeed considering that the applicant borrowed funds from the respondent and did not repay a single instalment.

f. The decision.

Regarding the application for amendment of the notice of appeal, the notice of appeal intended to be amended was filed before this court as required by *The Judicature (Court of Appeal Rules) Directions.* Order 6 rules 9, 18 and 31 of *The Civil Procedure Rules* give the Court a wide discretion to allow either party, at any stage of proceedings, to alter or amend his or her pleadings in such a manner and on such terms as may be necessary for the purpose of determining the real question in controversy as between the parties.

However, according to Rule 76 (5) of *The Judicature (Court of Appeal Rules) Directions*, a notice of appeal is only required to be substantially in Form D in the First Schedule to the Rules. The substantial components of that form require the notice of appeal to; state whether it is intended to appeal against the whole or part only of the decision; where it is intended to appeal against a part only of the decision, to specify the part complained of; state the address for service of the appellant; state the names and addresses of all persons intended to be served with copies of the notice; and be dated and signed by or on behalf of the appellant.

The notice of appeal sought to be amended meets contains these essentials. That it is headed "Court of Appeal" instead of the "High Court" is a mere want of form since it was filed in the correct forum. Moreover Order 6 rule 17 of *The Civil Procedure Rules*, provides that no technical objection may be raised to any pleading on the ground of any alleged want of form. This part of the application therefore appears to me to be purely technical and to be utterly unnecessary to warrant this court to grant the order sought.

Regarding the application for stay of execution pending appeal to the Court of Appeal, According to Order 43 rule 4 (3) of *The Civil Procedure Rules*, an application of this nature must be made after notice of appeal has been filed and the applicant should be prepared to meet the conditions set out in that Order including; - furnishing proof of the fact that substantial loss may result to the applicant unless the stay of execution is granted; that the application has been made without unreasonable delay; and that the applicant has given security for due performance of the decree or

order as may ultimately be binding upon him (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).

The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include:- 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; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid.

i. A notice of appeal has been filed.

The applicant have satisfied this requirement. The applicants filed a notice of appeal on 13th August, 2020 and applied for certified copy of the record of proceedings.

ii. The appeal is not frivolous and has a likelihood of success;

An appeal by itself does not operate as a stay of proceedings under a decree or order appealed from nor should execution of a decree be stayed by reason only of an appeal having been preferred from the decree (see Order 43 rule 4 of *The Civil Procedure Rules* and Rule 6 (2) of *The Judicature (Court of Appeal Rules) Directions*). In other words, the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause.

The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There should be a sound, rational basis, founded on the facts and the law, and a measure of certainty justifying the conclusion that the appellate court will differ from the court whose judgment has been appealed against; that the appellate court could reasonably arrive at a conclusion different from that of the trial court.

The appeal will be considered frivolous if *prima facie* the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. If there is a strong showing that the appeal has no merit, that is strong evidence that it was filed for delay or not in good faith. Additional evidence indicating a frivolous appeal is the applicant's conduct of prior litigation which may show that the appeal is merely part of a series of suits, applications and appeals over the same subject matter in which the applicant has engaged with no success or no chance of success. The prior litigation or procedural history can be used to establish the lack of merit in the present appeal or the bad faith of the applicant in filing the present appeal.

The applicants have not provided court with a draft memorandum of appeal of the intended appeal to the Court of Appeal. They also have not adverted to the arguments they intend to raise in support of those grounds. It is therefore not possible to assess whether they have an arguable case on appeal. Having perused the judgment, I have formed the opinion that that it is not possible on the material before me to determine whether or not there is a reasonable basis in law and equity to support the grounds raised and that they can be supported by good faith argument. It is therefore not possible to determine that the Court of Appeal could reasonably arrive at a conclusion different from that of the trial court. The applicant has failed to prove this requirement.

iii. <u>The appeal would be rendered nugatory</u>;

Nugatory means "of no force or effect; useless; invalid." In this context, the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling. Whether or not an Appeal will be rendered nugatory if a stay is not granted depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay.

Satisfaction of a money decree does not ordinarily pose the danger of rendering a pending appeal nugatory, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The presumption then is that payment made to the respondent in execution of the decree will be reversible in the event of the applicant succeeding

on appeal. If it is not reversible, it has not been shown that damages will not reasonably compensate the applicant, or that it is in the public interest to grant a stay. The respondent has not been shown to be impecunious. The applicant has failed to prove this requirement too.

iv. The application has been made without unreasonable delay.

Applications for a stay of execution ought to be made within a reasonable time. Whether delay is unreasonable will depend on the peculiar facts of each case. Delay must be assessed according to the circumstances of each case. The reckoning of time to determine if a delay is unreasonable begins at the time the decree or order is sealed and becomes enforceable.

In the instant case, the judgment was rendered on 11th August, 2020. The application was filed nearly four months later on 8th December, 2020. I therefore do not find any unreasonable delay in the filing this application.

v. There is serious or imminent threat of execution of the decree or order and if the application is not granted.

Imminent threat means a condition that is reasonably certain to place the applicant's interests in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. An order of stay will issue only if there is actual or presently threatened execution. There must be a direct and immediate danger of execution of the decree. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the decree, have been taken by the respondent. Steps that demonstrate a serious expression of an intent include; extracting the decree, presenting and having a bill of costs taxed, applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue. The applicant has not adduced evidence of this in the application.

The applicant has not presented evidence of any step of that nature having been taken by the respondent. The applicant has failed to prove this requirement too.

vi. Substantial loss may result to the applicant unless the stay of execution is granted.

Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal (see *Tropical Commodities Supplies Ltd and Others v. International Credit Bank Ltd (in Liquidation) [2004] 2 EA 331*). "Substantial" though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The loss ought to be of a nature which cannot be undone once inflicted.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (see *Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR*). For that reason execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to substantial loss or irreparable injury to the applicant, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The respondent has not been shown to be impecunious nor the fact that execution of the decree will have any irreversible effect. The applicant has failed to prove this requirement too.

vii. The applicant has given security for due performance of the decree or order.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. It is the reason that courts have been reluctant to order security for due performance of the decree. This requirement has been interpreted as not operating as an absolute clog on the discretion of the Court to direct the deposit of some amount as a condition for grant of stay of execution of the decree in appropriate cases,

more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal.

Courts have instead been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331* and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003*), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. The purpose of an order for security for costs on an appeal is to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding, which therefore implies such an order does not adequately meet entirely the purpose of security for due performance of the decree. In the case of a money decree, furnishing security for due performance of the decree denotes providing depositing the disputed amount.

The applicant has not undertaken to furnish such security, yet the court has a duty in exercise its discretion to grant stay of execution of a money decree, to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. For that reason, the applicant has failed to prove this requirement too

viii. Refusal to grant the stay would inflict more hardship than it would avoid.

The Court has the duty to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his or her judgement. No doubt it would be wrong to order a stay of proceedings pending appeal where the appeal is frivolous or where such order would inflict greater hardship than it would avoid (see *Erinford Propertied Ltd. v. Cheshire County Council [1974] 412 All ER 448*). It is also a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his or her judgement.

Apart from the averments that the applicant stands to suffer irreparable loss if execution ensues, the applicant has not offered evidence of objective facts from which it can be deduced that in the

circumstances of this case, execution will cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. Moreover, exposure to this eventuality arises from a background of a mortgage over the property, rendering the equitable basis for staying an eviction upon default, at probably its weakest. This is because a property owner who mortgages it has advance notice that it may be sold off in the event of default. I therefore have not found evidence to show that that the eviction would cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. If granted, the order is therefore likely to inflict greater hardship than it would avoid.

In conclusion, the applicant has not satisfied the majority of the essential requirements for the grant of an order of stay of execution pending appeal. Consequently, the application fails and is hereby dismissed with costs to the respondent.

Delivered electronically this 27th day of August, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
27th August, 2021.