THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0646 of 2021

(Arising from Civil Suit No. 0973 of 2016)

1. HABIB OIL LIMITED }
2. ELECTRO-MAAX (U) LIMITED } …… APPLICANTS
3. HABIB KAGIMU }
4. AHMED NOOR OSMAN }

VERSUS

COMMERCIAL BANK OF AFRICA (U) LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The respondent sued the applicants jointly and severally for recovery of US $ 934,346.05 with interest at the rate of 10% per annum and the costs of the suit. The parties on 26th May, 2017 executed a consent judgment binding the applicants jointly and severally to pay US $ 936,922 with interest at the rate of 10% per annum, in instalments of US $ 167,384.4 per month until repayment in full slated for not later than 28th November, 2017. They were to pay costs of US $ 9,280 on 28th June, 2017. The respondent reserved the right to commence execution of the decree upon default on any instalment by the applicants. The consent judgment was signed and sealed by court on 8th June, 2017.

The applicants then on 26th September, 20717 filed an application seeking to have the consent judgment and decree set aside on grounds that it had been entered in error, having been based on wrong computation of the outstanding sum, and that they had obtained material information that had not been available to them at the time the judgment was executed. That application was heard and dismissed with costs on 15th October, 2018. The applicants then filed a notice of appeal on 19th October, 2018 and applied for certified copy of the record of proceedings. The respondent having taken steps to enforce the decree, the applicants sought and obtained an order of stay of

execution of the decree on 18th February, 2019 pending appeal, conditioned on the applicants depositing in court a sum of US $ 275,480 within sixty days of the order, failure of which execution was to issue. Apparently the applicants failed to satisfy that condition since there is no evidence of compliance on record.

The respondent having recently renewed its interest to enforce the decree, the applicants have once again obtained an interim order of stay of execution of the decree, which was issued by the Registrar on 20th May, 2021 pending the disposal of this application.

b. The application.

The reapplication is made under section 98 of *The Civil Procedure Act* and Order 43 rules 4 (1) (2), (3) and (5) of *The Civil Procedure Rules*. The applicant seeks an order of stay of execution of the underlying decree and order, pending the disposal of the appeal. The grounds are that the respondent has taken steps to execute the order dismissing the application for setting aside the consent decree as a result of which the applicants stand to suffer irreparable loss if the same is executed before the appeal is heard. The respondent has sought to attach and sell property belonging to the 3rd applicant. The appeal will be rendered nugatory yet it has a very high likelihood of success

c. The affidavit in reply

In its affidavit in reply sworn by the Head of Credit Risk Management of NCBA Bank Limited, the respondent avers that the applicants only paid a total of US $ 257,000 in partial satisfaction of the decree, leaving an outstanding balance of US $ 679,922 which continues to attract interest. The applicants having previously been granted a conditional order of stay of execution whose condition they failed to satisfy are abusing court process by filing the current application. They have no automatic right of appeal against a decision of the judge rejecting an application for setting aside a consent judgement yet they have never applied for leave. The application is only intended to delay the process of recovery thereby occasioning the respondent financial loss as a banking institution.

d. Submissions of counsel for the applicant

Counsel for the applicant, M/s Muwema and Co. Advocates, submitted that the applicants have satisfied all legal requirements for the grant of an order of stay of execution. They have filed a notice of appeal, there is an imminent threat of execution of the decree, the application has been made without undue delay, they stand to suffer substantial loss if the stay is not granted, and are willing to provide security for due performance of the decree. If the application is not granted, the appeal will be rendered nugatory. .

e. Submissions of counsel for the respondent.

Counsel for the respondent, M/s Lex Uganda Advocates submitted that the applicants borrowed the money in dispute during the year 2014. The respondent had to resort to litigation for its recovery. Two years after the respondent obtained the decree the applicants are yet to re-pay in full. Since filing the notice of appeal and requesting for a certified co[y of the record of proceedings on 19th October, 2018 there is no evidence to show that the applicants have ever made a follow up. Substantial loss does not mean the ordinary loss to which every judgment debtor is necessarily subjected. Substantial loss should mean inability of the respondent refunding the money in the event of the applicant's success on appeal. The respondent is a financial entity operating in Uganda with the capacity to refund the money in the event of the applicant's success on appeal. The decision whose execution is sought to be stayed was made on 15th October, 2018.The application having been made over two year since then, it is belated. Having made a similar application previously, this application is res judicata. There is no valid appeal since the applicant has no right of appeal. No security has been provided for due performance of the decree. The application ought to be dismissed with costs.

f. The decision.

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 19th October, 2018 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 propriety of the intended appeal is doubtful. The right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17*; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah (No. 4) [1971] EA 50*). By virtue of section 76 (1) (h) of *The Civil Procedure Act,* a right of appeal exists from orders made under rules from which an appeal is expressly allowed by rules, appeals do not lie as of right from any other orders. Where leave to appeal is a requirement, the potential appellant will not be able to have his or her appeal heard unless leave to appeal is granted.

In the instant case, the notice of appeal was lodged against the decision of this court dismissing an application for review of a consent judgment. Order 44 of *The Civil Procedure Rules* specifies orders from which appeals arise as a matter of right. Rule 2 thereof states that an appeal under the Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given. The order sought to be appealed was made under Order 46 rule 4 of *The Civil Procedure Rules* which confers a right of appeal only against orders granting an application for review. In the instant case, the application for review was rejected. A party who wishes to apply to the lower court for permission to appeal should normally do so at delivery of the decision itself. The decision sought to be appealed was made on 15th October, 2018 and to-date, almost three year later, the applicant has never sought leave to appeal.

The reason for requiring leave to appeal from the majority of orders is to reduce appeals from such orders as much as possible, to ensure that conclusion of the case is expedited since appeals could

be used as a delay tactic (see *Thomas Borthwick & Sons (Pacific Holdings) Ltd and Others v. Trade Practices Commission, (1988) 18 FCR 424 at 433 per Bowen CJ, Lockhart and Sheppard JJ;*). The requirement that leave be obtained reduces the opportunity for such tactics to be employed and promotes the need for litigation to be conducted efficiently and at proportionate cost. It ensures that the enforcement of decisions does not become mired by interminable delays. On account of the fact that the notice of appeal was filed in respect of an order that is not appealable as of right, the existence of a valid process of appeal is cast in serious doubt.

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 respondent has not been shown to be impecunious. 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.

iv. <u>The application has been made without unreasonable delay</u>.

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. Factors which should be

taken into account in considering whether the length of the delay in presenting the application has been unreasonable include;

(a) The length of the delay; the longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason;

(b) The explanation for the delay; delays attributable to the respondent will weigh in favour of the applicant. Delays occasioned by systemic or institutional limitations of the judiciary, such as inadequate resources, must not weigh against the applicant. Although this may be justification for lenient treatment in the event of systemic delay but dilatory conduct of the applicant undertaken for the purposes of delaying the trial should be inexcusable;

(c) Waiver; where the respondent waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the applicant. An example of a waiver or concurrence that could be inferred is the consent by respondent to delayed enforcement of the decree or order.

(d) Prejudice to the respondent; actual prejudice is irrelevant when determining unreasonable delay. There exists a rebuttable presumption that, as of the moment of the judgment after prolonged litigation, the judgment creditor suffers a prejudice that springs from the date the cause of action arose, which prejudice increases over time until full recovery of the remedy is obtained. Therefore the longer the delay in making an application to stay the process of enforcement of the decree, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason.

The current presumptive ceiling of the actual or anticipated end of trials established by the practice of courts in Uganda is two years. Litigation is considered backlogged when it is not concluded within two years of filing. If the presumptive ceiling time limit is exceeded, then the delay will be presumptively unreasonable. In the instant case the decree whose enforcement is sought to be

stayed was entered on 8th June, 2017. The order dismissing the application seeking to set it aside was rendered on 15th October, 2018. This application was thus filed four years after the decree and over two and a half years after the order. In my view there has been an unreasonable delay in bringing this application which delay is not attributable to the chronic shortage of institutional resources in the Judiciary. The applicant has not offered any explanation for the delay. There is no evidence to show that the respondent waived his rights by consenting to or concurring in a delayed execution of the decree. I therefore find the delay in filing this application to be unreasonable.

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

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.

vi. <u>Substantial loss may result to the applicant unless the stay of execution is granted</u>.

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.

vii. <u>The applicant has given security for due performance of the decree or order</u>.

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.

Although the applicant has undertaken to furnish such security, 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, alternatively the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may withdraw the same without prejudice and subject to the result of the appeal. Such direction for deposit of part of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree. However in the circumstances of this case, the applicant does not merit such equitable intervention.

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.

Since filing the notice of appeal, the applicant has contributed substantially to delay in disposition of the appeal by tardiness in obtaining the certified copies of the record of proceedings and having the record forwarded to the appellate court. The most significant question in considering the dilatory conduct of the applicant is whether the applicant will benefit by delay. Most commonly, as is evident in the instant application, the benefit arises from delaying the execution of the judgment from which the appeal is taken. Bad faith usually consists of deliberately causing delay in order to occasion needless expense for the respondent or of denying the respondent the benefit

of the judgment for as long as possible. The culture of delay and complacency during litigation must not be encouraged.

Of further consideration is of the fact that this application is *res judicata*. According to section 7 of *The Civil Procedure Act,* no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court. To succeed in alleging *res judicata*, a party must show that (a) the matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) that the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned (see *DSV Silo v. The Owners of Sennar [1985] 2 All ER 104*).

When a question of fact or a question of law has been decided on its merits between two parties in a suit or proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. Essentially the test to be applied by court to determine the question of *res judicata* is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he / she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time (See further *Greenhalgh v. Mallard [1947] 2 ALL ER 255*).

More than two years ago, the applicants sought and obtained an order of stay of execution of the decree pending appeal on 18th February, 2019, conditioned on the applicants depositing in court a sum of US $ 275,480 within sixty days of the order, failure of which execution was to issue. I find that in the current application, the applicants have brought before the court, in another way and in

the form of a new application, matters they already put before this court in earlier proceedings and which have been adjudicated upon. The application is clearly *res judicata*. I find that the application is perilously close to being an abuse of process.

In light of all the foregoing, the order, if granted, would inflict greater hardship than it would avoid, hence the balance favours not granting the order of stay. The application is accordingly dismissed and the interim order of stay too is hereby set aside. The costs of this application and those for the application for the interim order of stay of execution are awarded to the respondent.

Delivered electronically this 23rd day of August, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
23rd August, 2021.