

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPLA
[COMMERCIAL DIVISION]
(M.A NO. 873 OF 2020 and MA NO. 1224 OF 2020)

(All arising from Misc. Appeal No. 007 of 2018)

(Arising from MA.No.2419 of 2018)

(Arising from MA.No.989 of 2017)

(All Arising from HCCS No.468 of 2017)

**UGANDA ELECTRICITY
TRANSMISSION CO.
LIMITED:.....:APPLICANTS**

VERSUS

JOHNSTON GROUP LIMITED:.....:RESPONDENTS

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] The applicant, Uganda Electricity Transmission Company(UETCL) filed an application (M.A No. 873 of 2020) on 15/10/2020 under Section 98 CPA, Section 33 Judicature Act, Order 43 r 4 and Order 52 of the Civil Procedure Rules seeking for orders that; *the execution of the ruling and Order of the High Court in **Misc. Appeal No.007 of 2018 (Uganda Electricity Transmission Company Limited Vs Johnston Group Ltd)** delivered on the 25th of September, 2020 be stayed until the hearing and the determination of the applicant's*

intended appeal to the Court of Appeal of Uganda and costs be provided for.

- [2] The respondent, Johnston Group Limited, also filed an application (M.A No.1224 of 2020) on 16/12/2020 for orders that; *a declaration that the respondent is in contempt of the orders of this honourable court in Misc. Appeal No.2419 of 2017; an order directing the respondent to formally renounce and or purge itself of the contemptuous acts by complying with the orders of this honourable court issued in Misc. Appeal No. 2419 of 2017; an order directing the respondent to pay the applicant compensation in the sum of Ugx 1,000,000,000 to atone for the damage and financial loss occasioned by its contemptuous acts and that UETCL pays the costs for the application.*
- [3] The brief background of these applications is that the learned Registrar of this court issued an order for a decree absolute in the execution of Civil Suit No.468 of 2017 whereupon UETCL as garnishee, was to release the monies held on behalf of the Judgment debtor (Isolux Ingenieria) to Johnston Group Limited. UETCL appealed the ruling and orders of the learned Registrar vide M.A No. 007 of 2018 which they lost on the 25th of September 2020 and the court upheld the said learned Registrar's decision.
- [4] Looking at the facts of both applications, I found it apposite to render one ruling as it would resolve all the matters in issue at once since they are closely related, emanating from the same facts and avoid a multiplicity of causes. This would in effect save a lot of resources especially the precious judicial time and money.
- [5] At the hearing of the applications, each of the parties raised a preliminary objection which I believe should first be dealt with and

resolved. UETCL submitted that the respondent had filed its affidavit in reply to the application (M.A No. 873 of 2020) out of time. That instead of filing the reply within fifteen days of service of the application, the same was filed after twenty one days which offends Order 12 rule 12. Counsel then relied on the case of **Stop and See (U) Ltd Vs Tropical Africa Bank Ltd, M.A No. 333 of 2010** to support his position and also state that the affidavit in reply was bad in law and as such ought to be struck off the record so that the application proceeds in default of the reply. In response, Counsel relied on the case of **Dr. Lam-Lagoro James Vs Muni University Misc. Cause No.007 of 2019** and stated that his client was prevented from filing a reply in time for good cause because at the material time it was in the process of getting another firm of advocates to represent it and further that this had occasioned no prejudice on the applicant since it was served on the 23/11/2020 and replied 08/12/2020 more than two months before the date given for the hearing.

[6] Order 12 rule 3(2) of the CPR

(2) Service of an interlocutory application to the opposite party shall be made within fifteen days from the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.

[7] On the other hand Johnston Group Limited raised an objection that the applicant could not seek a remedy from a court whose orders it was in contempt of. Counsel supported this position with the case of **Housing Finance Bank & Anor Vs Musisi, M.A No. 158 of 2010** where it was

stated that “a party in contempt of Court by disobeying an existing court order cannot be heard in a different but related cause or motion unless and until such person has purged him/herself of the contempt.”

- [8] I have considered all the pleadings and submissions on record. There's no doubt that Johnston Group Limited filed a response to this application outside the prescribed time limits under Order 12 rule 3(2) CPR. See also **Stop & See (U) Ltd Vs Tropical African Bank.** (supra) Be that as it may, the court is prepared to make an exception for the late filing given the circumstances and history of this case as well as the plausible explanation advanced by Johnston Group Limited. It had been submitted that at the time of service of this application on Johnston Group the respondents were in the process of engaging new advocates and indeed on the record there's clear evidence that a new firm M/s Kyagaba and Otiina Advocates have taken over the conduct of this matter from M/s Kampala Associated Advocates. As for the contempt of the court order I noted that the order was made on the 25/09/2020 on which date Johnston Group Limited extracted the order and served it on UETCL asking them to comply. Three days later UETCL lodged a Notice of Appeal and also wrote to the Registrar of the court requesting for a certified copy of the record. In addition, after thirteen days of the order, UETCL filed the instant application for orders of stay of execution of this order issued on 25/09/2020. It is worth noting that all the actions taken by UETCL were not only swift but also within the law and the prescribed time within which an appeal could be legally lodged. Since the period within which to appeal the court's decision of 25/09/2020 was still running, UETCL cannot be faulted for disobeying the impugned court order even if Johnston Group Limited

had written requesting them to comply and honor the satisfaction of that court order. Accordingly, I am unable to find UETCL in contempt of the impugned court order. With this discussion, the two preliminary objections raised and therefore **M.A No. 1224 of 2020** are hereby resolved.

- [9] Regarding the prayer for stay of execution of the orders in **Misc. Appeal No. 007 of 2018** Order 43 rule 4(3) CPR is instructive. The provision enjoins this court to grant such orders upon the applicant's fulfillment of all the 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 prima facie 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

- [10] **Likelihood of success of the appeal:** it was submitted that UETCL lodged a notice of appeal in the high court and also requested for a record of proceedings and that the appeal has a high likelihood of success premised on the fact that the learned trial Judge misdirected himself on the law of performance guarantees. In reply thereof the respondent stated that lodging an appeal did not operate as a bar to

execution proceedings. In **Gashumba Maniraguha Vs. Sam Nkudiye, S.C.C.A 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.*” 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. Although the applicant states that the success of the appeal is hinged on the fact that the Judge misdirected himself on the law pertaining to performance guarantees, it is noteworthy to state that the applicant in its submissions averred that the monies that were obtained under the performance guarantee were used to pay for the work left unfinished by the contractor.

- [11] This application is about attachment of monies admittedly withdrawn by UETCL from Eco bank. UETCL has submitted that it used the said money to complete the unfinished works earlier assigned to the contractor (Judgment creditor-Isolux Ingeneria). However, no evidence was adduced to substantiate this assertion. It should not be forgotten that Johnston Group Ltd was sub-contracted by the judgment creditor (Isolux Ingeneria) to carry out and indeed carried out some works for UETCL for which it was never paid. This is clearly indicated in the court’s judgment (Civil Suit 468 of 2017). But on the other hand, and most importantly so, this confirms that UETCL withdrew and took the money in question from Eco bank, monies in respect of the performance guarantee, yet the work had been done. 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”*. The applicant has failed to prove this ground.

- [12] **Substantial loss/ harm:** it was submitted by UETCL that if this application is not granted, execution of the Garnishee Decree absolute will gravely impact the financial operations of the applicant. Further, that the applicant will be under obligation to comply with the order and consequently be found in contempt of court. That if compelled to pay the decretal sum, then that would amount to taking over the Contractor’s obligations which will in turn be double payment to the subcontractor and would further be a burden on the government and the tax payer. Further that in case the applicant’s intended appeal succeeds it may not be able to recover from the respondent who is a foreign company. On the other hand, Johnston Group Limited stated that UETCL would suffer no substantial loss and allegations that recovery from the respondent upon success of the appeal wouldn’t be possible were unfounded. 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."

[13] Apart from stating that the applicant's financial operations will be gravely affected, the applicant does not go ahead to give the particulars of the same. There is no proof whatsoever that the monies in question were used to pay for the work left unfinished by the contractor, if at all, and as such there cannot be double payment for work that the sub-contractor already did and was not paid. Even the alleged loss likely to be occasioned to government and the tax payers is not substantiated. See **DFCU Bank Ltd Vs Dr. Ann Persis Nakate Lusejere C.A.C.A No. 29 of 2003**. I wish to add that there cannot be irreparable harm/substantial loss 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.

[14] 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 play in favour of Johnston Group Limited 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**.

[15] Be that as it may, and considering the unique facts and history of this case, I think the justice of this case would dictate that UETCL is granted a conditional stay of execution in the following terms:

- (i) that the decretal sum herein (USD 651,511) is deposited in this court within a period of ninety (90) days from the date hereof failing which the said order of stay of execution shall expire.
- (ii) I make no order as to costs.

I so order.

Dated, signed and delivered at Kampala this 30th day of April, 2021


Duncan Gaswaga

JUDGE