THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT]

M.A No. 1138 of 2020

(Arising from M.A No. 578)

(Arising from Civil Suit No. 459 of 2020)

ZIMBA LOGISTICS AND

HARDWARE LIMITED :: APPLICANT

VERSUS

TIAN-TANG GROUP LIMITED:: RESPONDENT

BEFORE HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is a ruling on an application brought under Section 98 CPA, Orders; 44 rules 2,3 &4 and 52 rules 1&3 CPR for orders that; *the applicant be granted leave to appeal against the ruling of this court delivered by His Lordship Justice Duncan Gaswaga on the 6th day of November 2020 in M.A No. 578 of 2020; execution proceedings in* ***Civil Suit No. 459 of 2020, Tian-Tang Group Limited Vs Zimba Logistics and Hardware Limited****, be stayed pending disposal of the applicant's appeal in the court of Appeal; any other orders that court deems fit and that costs of this application be provided for.*

[2] The grounds in support of this application were stated in the affidavit of Aeko Ali Awazi and were that; by its ruling of the 06th day of November 2020 in **M.A No. 578 of 2020, Zimba Logistics &**

Hardware Limited Vs Tian-Tang Group Limited, this honorable court declined to grant the applicant leave to appear and defend Civil Suit No. 459 of 2020; that the applicant is dissatisfied with the court's ruling and has already filed a notice of appeal and a letter requesting for the record of typed proceedings; that there are primafacie plausible grounds of appeal against the decision of this honorable court that merit serious judicial consideration to wit; *the honourable court erred in law and fact when it relied on credit reconciliations carried out by the respondent without the knowledge of the appellant, thus reaching a wrong, decision on the liability of the appellant*; the honourable court erred in law and fact when it found that the signature on the delivery notes were signed by the officer who signed and acknowledged receipt of the plaint and summons in Civil Suit No. 459 of 2020, thus reaching a wrong decision; that the grounds in the intended appeal, prima facie, raise serious issues of law and fact which merit serious judicial consideration in the court of Appeal with high chances of success; that the grounds in the intended appeal merit this honourable court to exercise its jurisdiction to grant the applicant leave to appeal; that the respondent has applied for and commenced execution proceedings of the orders in Civil Suit No. 459 of 2020 with EMA No. 66 of 2020 that if the execution proceedings in Civil Suit No. 459 of 2020 are not stayed it will render the intended appeal nugatory and a legal moot exercise; that the matter in question involves substantial amounts of money to wit; Ugx 1,752,465,000/= and the applicant will suffer substantial loss if a stay is not granted as the respondent seeks to attach and sale the applicant's movable and immovable property; that the application has been made without unreasonable delay since

the learning of the ruling in M.A No. 578 of 2020 and Civil Suit 459 of 2020 and that it is fair and just that leave to appeal be granted and the execution proceedings be stayed so that parties may be heard by a higher court for the ends of justice to be met.

[3] This application raises two issues to wit;

1. Whether the applicant should be granted leave to appeal

2. Whether the execution proceedings in Civil Suit No. 459 of 2020 should be stayed.

[4] Counsel submitted by way of written submissions and stated that it is a well-known position of the law that an appeal is a creature of statute as was held in the case of **Shah Vs Attorney General [1971] EA 50**. Counsel further relied on the cases of **Sango Bay Estates Limited Vs Dresdner Bank and A.G (1971) EA 71**, **G.M Combined (U) Ltd Vs A.K Detergents (U) Ltd Civil Appeal No. 23 of 1994** to state that the applicant in its paragraph 8 of the affidavit in support of the application raised primafacie plausible grounds of appeal, which in essence raise serious issues of law that merit serious judicial consideration in the Court of Appeal. Further that the Appeal ought to be heard because the applicant is entitled to a right of a fair hearing under Article 44 and 28 of the Constitution. Counsel concluded by praying that this issue be answered in the affirmative. Counsel further relied on the case of **Degeya Trading Stores Vs URA Court of Appeal Civil Application No. 16 of 1996** where it was held that; "an applicant seeking leave to appeal must show that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct." That relying on credit reconciliations that were done without the knowledge of the applicant and without taking

into consideration of the affidavit of Aeko Ali Awazi disputing liability to the claim, court came to the wrong decision. That the applicant further denied receiving goods to the tune of Ugx 1,752,465,000/=. That the application has high chances of success.

[5] On whether leave to appeal ought to be granted, Counsel for the respondent submitted that in an application of such a nature, the applicant must demonstrate that there are grounds of appeal which merit consideration. See **Sangobay Estates and Ors Vs Dresner Bank A.G [1971] EA 17**. Relying on **Herbert Sekandi t/a Land Order Developers V s Crane Bank Ltd HCMA No. 44 of 2007**, cited with approval in **Kenganzi Angella Vs Metl (U) Ltd M.A No. 471 of 2015**, Counsel submitted that the application before court does not raise any substantial issues to be tried on Appeal. That on the 1st ground to wit; The honourable Court erred in law and fact when it relied on credit reconciliations carried out by the respondent without the knowledge of the appellant, thus reaching a wrong decision on the liability of the appellant, counsel submitted that this fact was never disputed by the applicant in its affidavit in support to the application for leave to appear and defend. That contrary to the above assertion, the applicant's counsel confirmed during proceedings that indeed the reconciliations were signed by the applicant. Counsel can then not be seen to depart from the same.

[6] On the 2nd ground to wit; the honorable Court erred in law and fact when it found that the signature on the delivery notes were signed by the officer who acknowledged receipt of the plaint and the summons in Civil Suit No. 459 of 2020 thus reaching a wrong decision; counsel stated that the signature on the delivery notes and the signature

acknowledging receipt of the summons and plaint in this case are for the same person. That further during the proceedings the applicant did not deny receiving the goods and did not deny signing the delivery notes to acknowledge receipt thereof. That this is contrary to the decision in **Samwiri Massa Vs Rose Achen (1978) HCB 297**. Counsel concluded by submitting that the authority of **Nagunga Livestock Co-operative Society Limited Vs Energo Project Corporation H.C.C.S No. 207 of 1993** applies to this case and as such Court should find that the application for leave is not bonafide and has slim chances of success. That the same should be dismissed with costs.

Resolution:

[7] The rules of procedure provide for instances in which one may appeal as of right and for those in which one ought to seek leave of the court to appeal. This is one such instance. **Order 44 rule 2** states thus; *an appeal under these 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.* **Rule 3**; *applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.*

[8] In **Sango Bay Vs Dresdner Bank [1971] EA 17** Spry V-P held that;

> *"As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out."*

[9] In **Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors (Miscellaneous Application No 292 of 2014** court held that; *"In order to determine whether there are grounds which merit judicial consideration on appeal, the applicant has to demonstrate the grounds of objection showing where the court erred on the question or the issues raised by way of an objection. It would therefore be necessary to set out what the controversy before the court was and how it determined that controversy. For leave to appeal to be granted, the applicant must demonstrate that there are arguable points of law or grounds of appeal which require serious judicial consideration on appeal arising from the decision of the court on the controversy. It is necessary to set out the controversies upon which the court ruled and the grounds of the application which dispute or contest the correctness of the decision of the court on each controversy. Such grounds should be capable of forming the grounds of appeal deserving of serious consideration by the appellate court".*

[10] Important to note therefore, that for an application such as the one in these circumstances, one must prove to court that they have **points of law that merit serious judicial consideration**. Perhaps I should from the onset note that this court should in no way put itself in a position of the appellate court but make a judgment on the meritous nature of the intended appeal. According to **Protaff, John (1877) A Treatise on Trial by Jury, Including Questions of Law and Fact (1986 reprint ed.) Buffalo, NY: William S. Heir & Co.** a ***question of law***, *also known as a* ***point of law***, *is a question that must be answered by applying relevant legal principles to interpretation of the law.* The applicant's intended grounds of appeal are as follows; *The honourable*

Court erred in law and fact when it relied on credit reconciliations carried out by the respondent without the knowledge of the appellant, thus reaching a wrong decision on the liability of the appellant; as regards this ground, it ought to be noted that the disputed reconciliations were actually acknowledged by the applicant by way of signing on them. It is further important to note, which fact was earlier on alluded to in the ruling of this court in M.A No. 578 of 2020, that the applicant's director who signed the reconciliations on behalf of the applicant actually later on acknowledged receipt of the plaint and summons in Civil Suit 459 of 2020. This can be confirmed by a closer perusal of the delivery note signed on **06/02/2020** and as such it defeats logic for the applicant to inform court that the same credit reconciliations were done without its knowledge. What then did the applicant agree to by signing the reconciliations?

[11] On the 2nd ground to wit; the honorable Court erred in law and fact when it found that the signature on the delivery notes were signed by the officer who acknowledged receipt of the plaint and the summons in Civil Suit No. 459 of 2020 thus reaching a wrong decision; I find that this ground does not merit judicial consideration as seen in the above discussion.

[12] It is further apparent that the above intended grounds of appeal do not in any way fit within the definition for what a point of law is and in effect they do not raise substantial questions of law to be handled by an appellate Court. It is thus the finding of this court that the applicant does not satisfy conditions for the grant of leave to appeal as stated by the court in the case of **Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007**.

Stay of Execution:

[13] Counsel for the applicant, in his written submissions made no submission as to the grant of stay of execution.

[14] In regard to the application for stay of execution Counsel for the respondent submitted that the order for stay of execution cannot be granted because it seeks stay of execution pending the applicant's appeal in the Court of Appeal yet the entire application and affidavit in support of the application indicates no memorandum or record of appeal that has been filed in the Court of Appeal, thus indicating that there is no pending Appeal. See **Rule 83 of the Judicature (Court of Appeal Rules) Directions**. Further that Counsel for the applicant has not fulfilled the conditions set out in Order43 r (4) (3) CPR. That the Notice of Appeal filed is incompetent owing to the fact that the same was filed out of time. See **Rule 76(2) of the Judicature (Court of Appeal Rules) Directions**. That the applicant's loss of suffering substantial loss has not been proved beyond the allegation of loss of the sums amounting to the decretal sum which must be settled by the losing party. See **Andrew Kisawuzi Vs Dan Oundo Malingu, M.A 467 of 2013**. That as regards bringing the application without unreasonable delay, counsel submitted that the ruling was delivered on 11/11/2020 and the applicant was served with a notice to show cause why execution should not issue of 27/11/2020 which proceedings he attended on 30/11/2020. This application was consequently filed on 03/12/2020. Counsel however called upon this court to take into consideration the conduct of the applicant in always

filing applications and abandoning them in court only to be fixed for hearing by the respondents. Regarding payment of security for costs, counsel relied on the case of **International Credit Bank Limited (In Liquidation) Vs Tropical Commodities Supplies Limited & 2 Others, C.A.C.A No. 24 of 2004** to state that the same is mandatory yet the applicant had nowhere in his application or affidavit in support alluded to the same. That however, this is a commercial transaction for which the applicant ought to have paid security for the performance of the decree. Counsel concluded by praying that the application be dismissed with costs.

[15] The law on Stay of Execution is embedded in Order 43 rule 3 of the CPR. This is to the effect that;

(3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied;

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay;

(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her. The same conditions are reiterated in the case of ***Lawrence Musiitwa Kyazze v Eunice Busingye Civil Application No. 18 of 1990***

[16] **Substantial Loss**; An applicant's mere assertion that substantial loss will be caused to them without showing evidence to prove the same cannot suffice grant of stay of execution. In the case of **Gaaga Enterprises Limited and anor Vs Mpindi Muhamadi Bossi, Misc.**

App. No.02 of 2014 Masalu, J, while relying on **Transami (Tanzania) LTD vs M/S STE DATCO, Civil Application No.97 of 2004** where it was held that *"loss of business good will is just an ordinary loss to which every judgment debtor is necessarily subject to when he loses his case"*, stated that the applicant had not explicitly proved to the court which irreparable loss would be suffered. In the instant application, the applicant simply stated that the respondent has embarked on the process of attaching the applicant's movable and immovable property in execution for which the applicant will suffer irreparable loss. I am inclined to agree with the above decision that the loss alluded to by the applicant herein is one that is ordinarily the result of losing a case.

[17] **Unreasonable delay**; Counsel for the respondent avers that the said ruling in M.A No.459 of 2020 was delivered on 11/11/2020. The Notice to show cause why execution should not issue was served on 27/11/2020 and the applicant attended to the same before the registrar on 30/11/2020. This application was consequently filed on 03/12/2020. However, as noted earlier, the applicant has been in the habit of filing applications which they then abandon only for the same to be fixed for hearing by the respondent. This in the opinion of the court amounts to dilatory conduct by the applicant and is an action intended to delay the conclusion of this matter and deny the respondent the fruits of its judgment. I therefore find that the application was not brought before this court without unreasonable delay.

Security for due performance of the decree;

[18] Counsel for the respondent stated that nowhere in the applicant's application does the applicant indicate an intention to furnish security

for the performance of the decree. This is however mandatory as was stated in the case of **International Credit Bank Limited (In Liquidation) Vs Tropical Commodities Supplies Limited & 2 Others** supra that it was mandatory for the respondents who were appellants in the High Court to give Security for the due performance of the decree or order as may ultimately be binding upon them/ him or her. Considering this was a commercial transaction from which this dispute arose, the applicant ought to have furnished the said security before appearing before this court for a stay of execution.

Pending Appeal

[19] Order 43 rule 4(1) states that; An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High court may for sufficient cause order stay of execution of the decree. While explaining the above order, Nahamya, J in the case of ***Equity Bank Uganda Ltd versus Nicholas Were M.A No.604 of 2013,*** noted that; "*The import of this provision is that an Appeal to the High Court does not per se operate as a stay of execution of proceedings. Rather, any person who wishes to prefer an Appeal from such a decision shall institute a stay of proceedings on such sufficient cause being shown to Court. "Sufficient cause" under the provision, leaves the High Court with the discretion to determine whether the proceedings fall within the premises*"

[20] It follows therefore that a pending appeal is no reason enough to have the execution proceedings herein stayed, this should be in the courts discretion upon sufficient cause. From the facts at hand, though it is

apparent on the Court record that the applicant applied for a record of proceedings from this court and filed a Notice of Appeal also, the conduct of the applicant from the start of these proceedings is indicative of delay aimed at denying the respondent their fruits of judgment. I still find that the intended appeal does not raise any serious triable issues which would merit judicial consideration.

[21] **Accordingly, for the reasons already advanced herein, I find this application devoid of merit and hereby dismiss it with costs to the respondent.**

I so order

Dated, signed and delivered at Kampala this 19th day of March 2021

Duncan Gaswaga

JUDGE