

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

M.A No. 022 of 2021

(Arising from Civil Appeal No. 62 of 2020)

(Arising from TAT Application No. 46 of 2019)

THE ELMA PHILANTHROPIES (E.A) LTD:.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY:.....RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is a ruling on an application brought under Section 27, 28 TAT Act, Order 22 Rule 26, 89, Order 43 rule 4 and 5 and Section 98 CPA for orders that; *the execution of the ruling and order of the Tax Appeals Tribunal in TAT No. 46 of 2019 be stayed pending determination of the appeal and that costs of the application be granted to the applicant.*
- [2] The grounds of the application were stated in the affidavit of **Ms. Sara Tumwesigye** in support of the application and these are briefly that; *the applicant being dissatisfied with the ruling of the Tax Appeals Tribunal in TAT No. 46 of 2019 lodged a notice of appeal before this honourable court; the respondent has since issued an agency notice to collect the tax which is the subject of the appeal; the applicant's*



intended appeal has a likelihood of success; the applicant will suffer irreparable substantial loss which cannot be compensated by damages if execution of the judgment is not stayed; that execution of the said judgment would inevitably render the appeal nugatory and that the balance of convenience weighs in favour of granting the application; that the applicant paid 30% of the tax in dispute of Ugx 253,064,629/= and that it is just and equitable that this application is granted.

[3] The parties proceeded by way of written submissions.

[4] This application raises one issue to wit;


Whether the applicant has satisfied the conditions for the grant of stay of execution

[5] **Section 27(1) of the Tax Appeals Tribunal Act** is to the effect that

“a party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal.”

[6] The principles guiding an application for stay of execution are listed in **Order 43 CPR** and also espoused in a number of cases but notably in **Lawrence Musiitwa Kyazze Versus Eunice Busingye SC Civil Application No. 18 of 1990** that; *substantial loss may result to the party applying for stay of execution unless the order is made; that the application has been made without unreasonable delay and that security for due performance has been given by the applicants.*

[7] Order 43 rule 4(3) CPR enjoins this court to grant an order for stay of execution upon the applicant's fulfillment of all the required conditions therein. These grounds were outlined in the case of **Hon. Theodore**

 2

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*

Substantial loss:

[8] It was submitted for the applicant that the respondent is in the process of executing the ruling in TAT application No. 46 of 2021 and has since issued an agency notice to collect the tax which is the subject of this appeal. That this execution will inevitably bring the applicant's activities to a grinding halt and irretrievably damage the applicant's business and good will and as such the applicant will suffer substantial loss unless a stay is granted by this court. The respondent on the other hand stated that the applicant had not demonstrated that it will suffer substantial loss beyond merely stating it. That it is not sufficient to rely on the amounts involved without proving actual loss that would be occasioned by execution of the award.

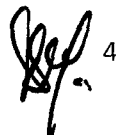
[9] In rejoinder thereof, it was submitted for the applicant that it is an NGO that conducts due diligence on NGO's and Charity organizations in

order to establish eligibility for funding. That as per the agency notice issued, the applicants intend to collect a total of **Ugx 843,548.766/=** which is too substantial an amount and also the applicant's working capital. That as such execution will cripple the applicant's business/ operations and in turn affect the operations of NGOs and charity organizations.

[10] 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** , **Dr. Ahmed Mohammed Kisuule** (supra) and **China Communications Construction Co. Ltd Vs Justus Kyabahwa M.A No. 692 of 2019.***

[11] The applicant has stated that the **Ugx 843,548.766/=** that the respondent intends to collect is its working capital and the only outcome of collecting such an amount would be to cripple the activities of the applicant and also the other NGOs and charity organizations that

 4

the applicant is in charge of. Not even damages can ameliorate such loss. This has not been challenged by the respondent. I therefore find that the applicant has satisfactorily proved this requirement.

Unreasonable delay

- [12] It was submitted for the applicant that it lodged a Notice of Appeal on 25/11/2020 in accordance with **Section 25(2) TAT Act** that as such filing this application after filing the notice of appeal indicates that the same has been brought without inordinate delay. The respondent on the other hand submitted that the ruling in the matter was delivered on 26/10/2020 and the current application was filed in January 2021 which is indicative of delay and as such the application must fail on that ground. In rejoinder thereof the applicant stated that Order 17 rule 6 on which the respondent relied is to the effect that a suit will be dismissed for want of prosecution if nothing has been done for two years. That in this particular instance the respondent had not extracted a decree to execute. Upon issuing an Agency notice on 10/01/2021, the applicant filed this application on 11/01/2021.
- [13] It is indeed true that the ruling in TAT application No. 46 of 2021 was delivered on 26/10/2020. The applicant later filed its application for stay of execution on 11/01/2021. This in itself is indicative of delay on the part of the applicant. I do not also agree with the reason advanced by the applicant for the delay stating that the respondent had not extracted a decree to execute.
- [14] In the case of **Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263** Sir Clement De Lestang, Ag. V.P stated



“ . . . It is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution . . . as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.”

- [15] This kind of application therefore, requires the vigilance of the party seeking to appeal a lower court decision which the applicant did not show. As such the application was not filed without unreasonable delay.

Security for due performance

- [16] It was submitted for the applicant that in accordance with Section 15 TAT Act, the applicant had paid 30% tax (Ugx 253,064,629/=) to the respondent and as such that satisfies the requirement for payment of security for due performance. In response thereof the respondent stated that the payment of 30% tax has no basis in law and as such the applicant has not fulfilled the requirement of payment of security for due performance. In rejoinder thereof the applicant submitted that 30% tax was substantial and sufficient for security for due performance.

- [17] Section 15 of the Tax Appeals Tribunal Act states thus;

“15. Deposit of portion of tax pending determination of objection

(1) A taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater.



(2) Subject to subsection (1), in the case of goods which are perishable, the goods shall be released to the taxpayer immediately after payment of the amount of tax prescribed in that subsection; but the Uganda Revenue Authority shall be given surety equivalent to the amount of tax assessed.”

[17] The provision of the law above gives directions on what a party who is objecting to an assessment ought to do however the objection referred to in Section 15 of the Tax Appeals Tribunal Act is the objection made against an assessment by URA and 30% of the disputed tax is required to be paid before the objection hearing by the Tax Appeals Tribunal. This therefore does not suffice as Security for due performance of the decree envisaged in an application for stay of execution pending appeal.

[18] In the case of **Amon Bazira Vs Maurice Pater Kagimu. K M.A No.1138 of 2016** it was held by court that; It has been trite that due performance of the decree can only be secured by the provision of security for costs. The Supreme Court had taken the same position in the case of **Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990**. In the circumstances therefore, the applicant has not satisfied the requirement for payment of security for due performance of the decree.

Imminent Threat of Execution

[19] The applicant relied on the case of **National Enterprises Corporation Vs Mukisa Foods Ltd, M.A No. 7 of 1998 C.A** where it was held that; “Where a right of appeal exists, the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being rendered nugatory” to state that this court ought to see that the intended appeal is not rendered nugatory since the respondent intends to execute as it has already issued an agency notice. It has indeed been

proved by the applicant that there is imminent threat of execution as the respondent has issued an agency notice in respect to the tax assessed by the respondent.


Likelihood of success

[20] It was submitted for the applicant that there are serious questions for determination in the Notice of Appeal that this court ought to give serious consideration. See **Gashumba Maniraguha Vs Sam Nkundiye, S.C.C.A No. 24 of 2015.** In response thereof it was submitted by the respondent that pendency of an appeal is not a bar to a successful party's right to enforce a decree obtained by execution. That the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. See **GAPCO Uganda Ltd Vs Kaweesa & Anor M.A No. 259 of 2013.** In rejoinder thereof, it was submitted for the applicant that there are serious questions to be tried by this court and these are clearly laid out in the grounds of appeal in the Notice of Appeal.

[21] In **Gashumba Maniraguha Vs. Sam Nkudiye SCCA No. 24 of 2015,** the Supreme Court 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."

[22] It was also submitted for the respondent that the grant of stay of execution would be hampering the respondent's exercise of her statutory mandate. That by executing the decree, the respondent shall be exercising her statutory authority to collect taxes and should not be unnecessarily hampered in the exercise of the same. In reply thereof, it was submitted for the applicant that the current application does not

 8

seek to interfere with a lawful mandate since the applicant is not challenging the implementation of the law but only exercising a right of appeal as provided under Sections 27 and 28 of the Tax Appeals Tribunal Act.

[23] I am inclined to agree with the applicant that in as much as the respondent has a statutory mandate to execute, the law also gives the applicant a right to appeal against a decision that it is dissatisfied with, all this in the interest of justice. On the whole, the courts should be very slow in curtailing a party that would like to genuinely exercise its right of appeal, of course bearing in mind the possible abuse of this right when other parties that may be interested in frustrating a successful party from enjoying the fruits of their case employ delaying tactics.

[24] In light of the above discourse therefore, and in the interest of justice, the applicant will be granted a conditional order for stay of execution couched in the following terms;

- (i) **that before pursuing the appeal the applicant should deposit a sum of Ugx 421,774,383/= (50% of the decretal sum) in this court within a period of sixty (60) days failing which the conditional order shall expire.**
- (ii) **Given that the respondent has succeeded on some of the grounds I shall make no order as to costs.**

I so order.

Dated, signed and delivered at Kampala this 24th day of January, 2022



Duncan Gaswaga

JUDGE