

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION No. 1760 of 2021**

**(Arising from Civil Suit No. 0143 OF 2018)**

**KENLLOYD LOGISTICS (U) LIMITED ..... APPLICANT**

**VERSUS**

**TOTAL UGANDA LIMITED ..... RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**RULING**

a. Background.

On or about 27<sup>th</sup> February, 2018 the respondent filed High Court Civil Suit No. 0143 of 2018, under summary procedure against the applicant seeking recovery of shs. 2,462,415,374/= being the cost of fuel supplied by the respondent to the applicant on credit, during the construction of the Kampala-Entebbe Expressway. The applicant filed an application seeking unconditional leave to appear and defend the suit. When that application came up for hearing on 16<sup>th</sup> May, 2018, a consent judgment was instead entered in favour of the respondent against the applicant, in the following terms;

- a) That on top of UGx 500,000,000/= (five hundred million shillings) so far paid, an additional sum of UGx 500,000,000/= (three hundred million shillings) will be paid by the defendant on 16<sup>th</sup> June, 2018 bringing the total to UGx 800,000,000/= (eight hundred million shillings).
- b) The balance is to be paid in 3 (three) quarters effective 31<sup>st</sup> July, 2018.
- c) The interest of UGx 689,476,305/= will be paid by the defendant after payment of the last quarter.
- d) In case of default on any sum, the entire unpaid sum will fall due and [be] recoverable.
- e) The costs to the plaintiff be taxed.

The respondent's costs were subsequently taxed and allowed at shs. 37,341,110/= Claiming that the applicant has defaulted on its obligation under clause (a) of the consent judgment and thus triggered clause (d) thereof, the applicant on or about 29<sup>th</sup> October, 2018 obtained a garnishee

order nisi authorising the attachment of shs. 2,151,891,679/= then believed to be available on the applicant's bank account. Instead the garnishee reported that the applicant owed it shs. 727,059,258/= on that account. The order was not made absolute and was vacated on 27<sup>th</sup> November, 2018 when it turned out that there were no funds on the applicant's bank account available for attachment at the time.

On 21<sup>st</sup> December, 2018 the respondent then filed a creditor's petition for the winding up of the applicant for insolvency, whose filing was published in a daily newspaper on 28<sup>th</sup> December, 2018. The applicant contends that by the time the petition was filed, it had paid the respondent up to shs. 1,212,748,554/= of the decretal sum. It contested the petition on ground that it was not preceded by a statutory demand. The proceedings for winding up were on that account on 17<sup>th</sup> December, 2020 dismissed with costs for incompetence. On 17<sup>th</sup> December, 2021 the applicant filed a suit in the Civil Division of this Court seeking a declaration that the petition for winding up was unjustifiably filed and its unwarranted publication was defamatory of the applicant.

b. The application.

The application is made under the provisions of section 14 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, Order 22 rules 26 and 89 of *The Civil Procedure Rules*. The applicant seeks an order staying execution of the decree in High Court Civil Suit No. 0143 of 2018 between the same parties on ground that there is a subsequent suit No. 0385 of 2021 between the same parties, pending before the Civil Division of this court. The applicant contends that although it is a judgment debtor in the former suit, settled by way of a consent judgment filed on 6<sup>th</sup> June, 2018 it has since then filed the suit now pending before the Civil Division, by which it seeks reliefs including an award of general damages for libel, arising out of the premature and malicious attempt by the respondent to execute the decree in the earlier suit. Although the applicant has on several occasions sought to have its outstanding obligations under the consent decree settled amicably, the respondent has been un-cooperative, prompting the filing of the pending suit, which has a high probabilities of success.

c. Affidavit in reply

By its affidavit in reply, the respondent contends that since the consent judgment was entered on 16<sup>th</sup> May, 2018 by virtue of which the decretal sum ought to have been paid in full by 31<sup>st</sup> July, 5 2019, to-date the respondent is yet to pay in full. The respondent's attempt to recover the outstanding amount was unsuccessful by reason of an insufficient amount of funds on the applicant's bank account at the time. The applicant's indebtedness as at 30<sup>th</sup> March, 2022 stood at shs. 1,421,858,661/= The pending suit filed subsequently by the applicant has no connection to the recovery of that outstanding sum. The applicant has since 7<sup>th</sup> January, 2019 written to the 10 respondent undertaking to pay in instalments, to no avail. The pending suit filed subsequently by the applicant is only intended to delay recovery of the outstanding sum under the concluded litigation. There I no likelihood of the applicant suffering irreparable damage. The application therefore ought to be dismissed.

15 d. Submissions of counsel for the applicant.

M/s Lex Uganda Advocates and Solicitors, on behalf of the applicant submitted that the applicant is a judgment debtor by consent. The respondent commenced action against the applicant that gave rise to civil suit No. 385 of 2021. In that suit damages are sought for execution that was wrongful; 20 execution was premature and they also wrongfully filed insolvency proceedings. Order 22 rule 26 of *The Civil procedure Rules* applies where there is a pending suit against the holder of a decree. In breach of he plans the respondent commenced execution in October, 2018 which had the effect of cancelling the applicant's credit facilities and cash flow and ability to pay the debt. The order was not made absolute but the damage had been done. The respondent published in the newspaper that the applicant was subject to insolvency proceedings. It suggested that the applicant was 25 undergoing insolvency proceedings buy the court. The court found that the insolvency proceedings were commenced in error. The demand was made before the debt was due. Insolvency affected the business of the applicant. The matter could not be raised in the insolvency proceedings because they arose later. Some of the matters could have been raised in the same proceedings but other 30 errors occurred after the proceedings had long been determined. The process of execution by the respondent began a month earlier. If the court itself wronged the applicant, he deserves a remedy.

It is a going concern but cash flow is an important. The applicant had no problem in paying and had paid whatever was due until the fault of the respondent. They cannot benefit from their own wrong. They acted in bad faith. The court made no decisions; the debt was not due by the time the execution was commenced. Bad faith against the applicant cannot stand. The judgment debtor did not dispute the debt. The first appearance resulted into a consent. The promises were made but there has not been a response by way of acceptance. The obligation to pay is clearly understood. The merits of the case will be investigated by the Civil Division.

e. Submissions of counsel for the respondent.

M/s Kamahoro, Kiboome and Kirunda Advocates on behalf of the respondent submitted that it was the order of the court under paragraph (b) of the consent judgment that the respondent was to be paid in full 31<sup>st</sup> October, 2018. The application for garnishee was filed in September, and an order was issued 25<sup>th</sup> September, 2018. The applicant had defaulted on the payment of shs. 300,000,000/= that was payable by 16<sup>th</sup> June, 2018. That justified the filing for garnishee as per paragraph (d) of the consent judgment. The acts of the respondent did not affect the applicant's liability to pay. Annexure "F" dated 7<sup>th</sup> January, 2019 stated that they were instructed to advise on the negative impact of the insolvency. They paid after the unsuccessful recovery by insolvency. The bank never recalled the facility. There is no connection between the execution and the matter before the civil division. Paragraph 7 of the affidavit in reply shows that they have promised to pay every month. They made undertakings before. It is made three years after the decree. Stay will affect the respondent's cash flow.

f. The decision.

According to Order 22 rule 26 of *The Civil Procedure Rules*, where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. A perusal of this rule would reveal that there should be simultaneously two proceedings in one or more Courts. One is the proceeding at the execution stage filed by the decree holder against the judgment debtors and the other proceeding

is a suit filed by the judgment debtors against the decree holders. One suit should be proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other suit pending at the instance of the judgment-debtor against the decree-holder. Further, the suits need not be pending in the very same court.

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The stay of execution granted under this rule is directed at allowing for adjustment of claims or prevention of multiplicity of execution proceedings. It is intended to enable the judgment debtor and the decree holder to adjust their claims against each other as well as to prevent the multiplicity of execution proceedings. The grant of stay is discretionary and the same will have to be ordered with due care and caution. The application may be granted subject to conditions such as depositing in court security for due performance of the decree (see *Peter Mulira v. Mitchell Cotts, H. C. Misc. Application No. 715 of 2009*). Execution is stayed so that the rights of the parties after the determination of the other suit can be adjusted.

15 Although in *Iddi Halfani v. Hamisa Binti Athuman [1962] EA 761* it was held that the rule imposes no condition regarding the nature of the pending suit such that all that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be execute, “Jurisdiction to stay execution of the decree under Order 21, Order 29 [*in pari materia* with our  
20 Order 22 rules 26] has to be exercised with great care and only in special cases” (see Mulla on “*The Code of Civil Procedure*” 15<sup>th</sup> Edition (1996), at page 1684). Exercise of the power of stay under this rule depends upon the facts and circumstances of each case.

The practice is that an order of stay in these circumstances is not granted simply because there is a suit pending in a court against the holder of a decree of the court in the name of the person against whom the decree was passed (see *Burnett v. Francis Industries plc [1987] 2 All ER 323; [1987] 1 WLR 802*). It is justified only where there are “special circumstances” and that it is “inexpedient” that the judgment be enforced, meaning that enforcement would be unjust (see *Canada Enterprises Corp Ltd v. MacNab Distilleries Ltd [1987] 1 WLR 813 at 818C*). Existence of the suit coupled  
30 with foreseeable difficulties in enforcing judgment on it if it succeeds, can amount to special circumstances. No hard and fast rule can be laid down in what cases stay would be granted or

refused. Although the power to grant stay is discretionary, yet it should be exercised on certain legal principles; so the question for consideration is not whether the Court has got the power to grant stay, but the manner in which the Court would ordinarily exercise its discretion vested in it by law.

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When adjudicating an application under this rule, the court is required to consider; (i) the nature of the claim in the other pending suit; (ii) the extent of identity between the defendant and the other party; (iii) the relationship (if any) between the claim giving rise to the judgment and the claim in the other pending suit; (iv) the strength of the claim in the other pending suit; (v) the size of the claim in the other pending suit; (vi) the likely delay before the claim in the other pending suit will be determined; (vii) the prejudice to the judgment creditor if a stay is granted; and (viii) the risk of prejudice to the party making the cross-claim if a stay is refused (see *Burnett v. Francis Industries plc* [1987] 2 All ER 323; [1987] 1 WLR 802). The discretion must be exercised judicially and in the interests of justice and not mechanically and as matter of course. In general, the discretion to stay execution under this rule should be exercised sparingly, in the clearest of cases, on such terms as are considered just.

i. The extent of identity between the defendant and the other party.

There should be simultaneously two proceedings in the Courts. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree- holder. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree against the judgment-debtor. In the instant case, the parties in both suits are the same, save that whereas in the suit ending execution the judgment creditor is the plaintiff, in the other pending suit the judgment creditor is the defendant.

ii. The nature of the claim in the other pending suit.

The intended purpose of the rule is the prevention of multiplicity of proceedings and to ensure that the applicant can set off or wipe out any amount due by him or her towards any amount due to him

or her from the respondent. This rule is based on the principle that the judgment debtor may not be harassed if he or she has a substantial claim against the decree holder which is pending for decision of the court executing the decree or another court. If the court is of the view that there is some substance in the claim, it may order for the stay of execution filed by the defendant in that case but not otherwise. There should not have been delay in the commencement of the other pending suit. All the circumstances of the case must be considered.

A paramount factor that the court considers is whether the other pending suit, if successful, would be rendered nugatory if the stay of execution is not awarded. A successful suit rendered nugatory means that the outcome of the suit is essentially not worth anything because the victorious applicant cannot be restored to his or her original position prior to the execution. The applicant's claim in the suit pending before the Civil Division springs from the respondent's unsuccessful attempt to enforce the decree against the applicant through insolvency proceedings. It is contended by the applicant that the attempt was unjustified and resulted in injury to the corporate reputation of the applicant. To prove *prima facie* defamation, the applicant must show four things: i) a false statement purporting to be fact; ii) publication or communication of that statement to a third person; iii) fault amounting to at least negligence; and iv) damages, or some harm caused to the person or entity who is the subject of the statement. A corporation is defamed if material is published about that corporation that would tend to negatively impact its standing in the business in which it operates. The applicant has in the other pending suit before the Civil Division, pleaded facts establishing its cause of action.

I do not find, in light of the nature of the suit pending in the Civil Division, the applicant's success therein will be rendered nugatory or that it will not be possible to restore the applicant to its original position prior to the execution.

iii. The relationship (if any) between the claim giving rise to the judgment and the claim in the other pending suit.

The decree sought to be executed ought to have a correlation with the pending suit, otherwise, the primary purpose of the provision will not be satisfied. The decree must be allowed to be executed,

and unless an extraordinary case is made out, no stay should be granted. Even if a stay is granted, if there is no relationship between the claim giving rise to the judgment and the claim in the other pending suit, the stay must be granted on suitable terms, so that the earlier decree is not stifled. Where there is a risk that the other pending suit will prove abortive if the applicant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay. When the parties are closely connected and the claims advanced against one another arose out of the same transactions and occurrences and raise common questions of fact and law, the stay is more likely to be granted. The applicant should be able to demonstrate factors that establish a real and substantial connection between the claims in the decree and those in the other pending suit.

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A stay of execution pending another suit between the same parties will generally be granted where the execution would essentially render the other pending suit moot, or would substantially reduce, or have a material impact on, the issues to be determined in that other pending suit, such as where; it will destroy the subject matter of the proceedings; foist upon the applicant a situation of complete helplessness: render nugatory any order or orders of the Court; paralyse in one way or the other, the exercise by the applicant of his or her constitutional right to sue; or create a situation in which even if the applicant succeeds in his or her suit, there could be no return to the status quo; where the applicant can show that when money is paid, pursuant to a monetary decree, the respondent will be unable to refund it in a case the suit succeeds or; that the suit has great merit and to enforce the decree in the meantime will be ruinous to the applicant.

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The decree sought to be executed herein arose from a commercial transaction. The other suit pending before the Civil Division is one for libel. I find that sustaining the suit in libel will not be effected by execution for recovery of a purely monetary award in a commercial transaction. Execution of the decree will not stifle the applicant's ability to pursue a claim in libel or compromise the issues to be determined in that suit.

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iv. The strength of the claim in the other pending suit.

The likelihood or even possibility in law of the claim in the other pending suit being successful, upon the materials before court at the hearing of the application, must be a relevant factor in

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deciding whether the discretion should be exercised upon terms or at all. Suits of uncertain and speculative character should not be the basis of granting a stay of execution. A person should not be deprived of the fruits of his or her decree merely because suits of frivolous character are instituted and the other party is out after a further series of litigation.

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A judgment creditor intent on frustrating or prolonging, for as long as possible, the execution of a decree, will approach the situation in multiple ways, including the filing of some frivolous claim in which weak, speculative and opportunistic claims are made against the judgment creditor on basis of which a stay of execution may then be sought. The court will not generally speculate upon the applicant's prospect of success, but may make some preliminary assessment about whether the applicant has an arguable case, in order to exclude a suit filed without any real prospect of success simply to gain time.

In the instant situation, the applicant will have to overcome the defence of privilege in the other suit pending before the Civil Division. A privilege provides protection to a person in a specific circumstance, either raising the burden of proof for a plaintiff seeking to recover against that person, or providing a defence to the claim. One such privilege is the judicial proceedings privilege. Statements made by a participant in a litigation which were made in the course of a judicial proceeding and had some connection to the issues being litigated, are protected by an absolute privilege. In order for people to be able to freely use the courts to settle their private disputes, all parties involved in any judicial proceeding or proposed judicial proceeding are protected by absolute privilege. Any communication made to an advocate, prosecutor, officer of the court or public is protected as long as the material has some reference to the subject of the proposed litigation. The notice in the newspaper that is the subject of the suit was published in connection to insolvency proceedings then pending in court.

v. The size of the claim in the other pending suit.

One of the aims of this rule is to prevent the judgment debtor from being compelled to satisfy the decree by providing the sum due when it might be proved (after his or her claim against the decree-holder was finally determined) that on balance, he or she owed the decree-holder less than the

decretal sum or nothing at all. The court should be mindful of the importance of the usual practice of staying the execution of judgments pending other proceedings in court where there is a risk that the respondent will be unable to repay the money without difficulty or delay if the other pending suit were to succeed.

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If the applicant can show that the decree holder is insolvent and would fail to reimburse the decretal sum and pay damages to the applicant if the other pending suit were successful, then a stay of execution might be justified. Alternatively, if the monetary decree, if paid, would go to a foreign jurisdiction where recovery of the same might be difficult, that can also amount to special circumstances.

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In the instant case, whereas the amount recoverable under the decree is ascertained at shs. 1,421,858,661/= as at 30<sup>th</sup> March, 2022 the claim by the applicant in the other sit pending before the Civil Divisions is for yet to be ascertained general damages, at the discretion of the court. The applicant has prayed for over shs, 2,500,000,000/= as general and punitive damages but those figures are superfluous in light of the fact that such damages are assessed by and entirely at the court's discretion. Although the plaintiff has included a claim for special damages of shs. 200,000,000/= the particulars of that claim are not specified. At this stage, the fact that the applicant will eventually be able to adjust his claim against the respondent as decree holder would be highly speculative.

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On the other hand, when it comes to decrees involving a pure monetary award, it is often more difficult to argue for a stay of execution of the same. In other words, the court will usually demand that the judgment debtor pays the judgment creditor the sum stipulated in the court judgment. This may be the case even if a large amount of money is involved. Her is no evidence to show that the respondent holder is insolvent and would fail to reimburse the decretal sum and pay damages to the applicant if the other pending suit were successful, nor that the monetary decree, if paid, would go to a foreign jurisdiction where recovery of the same might be difficult.

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vi. The likely delay before the claim in the other pending suit will be determined.

5 A decree passed by a competent court should be allowed to be executed and unless a strong case is made out on a cogent grounds no stay should be granted. It is a fundamental consideration that the decree has been obtained by the decree holder who should not be deprived of the fruits of that decree except for good reason. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit between the same parties might succeed. Such suits are also of a very precarious nature. The conditions preceding the court's order regarding a stay on execution of decree usually are that; the application has been made without unreasonable delay; the applicant might suffer from a substantial loss, unless such stay is granted; and security has been given by the applicant for the due performance of the decree. In the absence of any extraordinary circumstance the extraordinary relief under the provision should not be granted.

15 A cause of action is the set of facts which give rise to a claim enforceable in court. It is a legally recognised wrong that creates the right to sue. Each cause of action consists of points the plaintiff must prove and all of these elements must be satisfied in order to take court action. The general rule is that the limitation period starts running when the damage occurs, or when the claimant could have reasonably become aware of the damage. In cases of libel, the cause of action accrues on the date of communication of defamatory material by the defendant and damage suffered by the plaintiff. In the instant case, the petition was filed on 21<sup>st</sup> December, 2018 while the impugned publication was made on 28<sup>th</sup> December, 2018. The suit based on that publication was filed on 17<sup>th</sup> December, 2021, just eleven days before expiry of the three year limitation period. Therefore there was a significant unexplained delay between the events giving rise to the cause of action and the commencement of proceedings.

25 Besides that, the current status of case backlog in the Civil Division of this court dictates that the likelihood of disposal of a suit taking more than two years is more likely than not. In the event of the decision being appealed, final conclusion of the matter may take even much longer. On the other hand, having been entered as a consent judgment, the decree sought to be executed is final since it cannot be appealable and there are no proceedings pending for its review. By staying

execution the court will have preferred an outcome to be achieved over an indeterminate period in the future, over one that was finalised over three years ago.

- vii. The prejudice to the judgment creditor if a stay is granted.
- 5 viii. The risk of prejudice, in the other pending suit, to the applicant if a stay is refused.

These two factors will be considered concurrently. The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties. 10 By staying the execution of the decree, the decree-holder, has to be deprived of getting his or her fruits and realising the same. The court has to determine whether or not by staying execution of the decree, great injustice would be caused to the decree holder.

The applicability of Order 22 Rule 26 of *The Civil Procedure Rules* cannot be taken lightly and as 15 a matter of right. Exercise of this power and discretion should be invoked only when an exceptional and extra-ordinary case is made out by the judgment-debtor. The applicant in this case has not demonstrated any foreseeable difficulties in enforcing judgment if it succeeds in the pending suit, yet on the other hand as much as shs. 1,421,858,661/= which was supposed to have been paid in full by 31<sup>st</sup> October, 2019 under the consent decree is to-date still yet to be paid to the respondent. 20 This, according to me, has caused great injustice to the decree-holder which will only be exacerbated by a grant of stay pending the disposal of the other suit.

On 16<sup>th</sup> May, 2018 it will be exactly four years since the consent decree was entered. If at this point in time, the decree holder is still not able to enjoy fully the fruits of the decree and has to 25 wait eternally or for a further indeterminate period for the conclusion of the proceedings in that pending suit, it would cause grave injustice and constitute a mockery of justice. Therefore, in my considered opinion the application for stay of execution of the decree must fail. It is accordingly dismissed with costs to the respondent.

Delivered electronically this 5<sup>th</sup> day of April, 2022

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.....Stephen Mubiru.....  
Stephen Mubiru  
Judge,  
5<sup>th</sup> April, 2022.